(39)

No. 93-518-CSX
Status: GRANTED

Title: Florence Dolan, Petitioner
v.
City of Tigard

Docketed:
September 30, 1993

Court: Supreme Court of Oregon

Counsel for petitioner: Smith,David B.

Counsel for respondent: Coleman,James M., Ramis,Timothy V.

Opinion entered 7-1-93.

Entry	Date	Note	Proceedings and Orders
1	Sep 30 1993	G	Petition for writ of certiorari filed.
2	Oct 29 1993	G	Motion of Northwest Legal Foundation for leave to file a brief as amicus curiae filed.
5	Nov 2 1993	G	Motion of Pacific Legal Foundation, et al. for leave to file a brief as amici curiae filed.
3	Nov 3 1993		DISTRIBUTED. November 24, 1993 (Page 3)
4	Nov 3 1993	G	Motion of National Association of Home Builders, et al. for leave to file a brief as amici curiae filed.
7	Nov 3 1993	G	Motion of Mountain States Legal Foundation, et al for leave to file a brief as amici curiae filed.
6	Nov 4 1993	G	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
8	Nov 4 1993	G	Motion of Oregon Association of Realtors for leave to file a brief as amicus curiae filed.
9	Nov 4 1993	X	Brief of respondent Tigard, Oregon in opposition filed.
10	Nov 10 1993	X	Reply brief of petitioner filed.
11	Nov 29 1993		Motion of Northwest Legal Foundation for leave to file a brief as amicus curiae GRANTED.
12	Nov 29 1993		Motion of Pacific Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
13	Nov 29 1993		Motion of National Association of Home Builders, et al. for leave to file a brief as amici curiae GRANTED.
14	Nov 29 1993		Motion of Mountain States Legal Foundation, et al for leave to file a brief as amici curiae GRANTED.
15	Nov 29 1993		Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
16	Nov 29 1993		Motion of Oregon Association of Realtors for leave to file a brief as amicus curiae GRANTED.
17	Nov 29 1993		Petition GRANTED.
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18	Jan 10 1994		Brief amici curiae of Georgia Public Policy Foundation, et al. filed.
20	Jan 12 1994		Brief amici curiae of Pacific Legal Foundation, et al. filed.
22	Jan 12 1994		Brief amici curiae of Thomas H. and Esther H. Nelson filed.
19	Jan 13 1994		Brief amici curiae of Defenders of Property Rights, et al. filed.
21	Jan 13 1994		Brief amicus curiae of Jon A. Chandler filed.
23	Jan 13 1994		Brief amici curiae of National Association of Home Builders, et al. filed.
24	Jan 13 1994		Joint appendix filed.

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Entry	Date	Note	Proceedings and Orders
25	Jan 13 1994		Brief of petitioner Florence Dolan filed.
26	Jan 13 1994		Brief amici curiae of Mountain States Legal Foundation, et al. filed.
27	Jan 13 1994		Brief amici curiae of Washington Legal Foundation, et al. filed.
28	Jan 13 1994		Brief amicus curiae of Institute for Justice filed.
29	Jan 13 1994		Brief amici curiae of American Farm Bureau Federation, et al. filed.
30	Jan 13 1994		Brief amici curiae of National Association of Realtors, et al. filed.
31	Jan 13 1994		Brief amici curiae of Terence and Tamara Wellner filed.
32	Jan 13 1994		Brief amicus curiae of Northwest Legal Foundation filed.
33	Jan 28 1994	P	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
34	Feb 2 1994		SET FOR ARGUMENT WEDNESDAY, MARCH 23, 1994. (1ST CASE).
35	Feb 9 1994		CIRCULATED.

93-518

No. _____

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October Term, 1993

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Petitioner,

v.

CITY OF TIGARD,

Respondent.

Petition For Writ Of Certiorari To The Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case squarely presents the question of when this Court's opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) permits property owners, who desire legitimate use of their lands – reasonable and beneficial uses which meet all standards for approval – to be singled out by local government to finance the costs of providing public recreation, service and transportation facilities for that jurisdiction's residents. This question is present in almost every one of the vast array of municipal exactions imposed on new development by cities, counties, and special districts, not only throughout the State of Oregon, but also throughout the United States.

Petitioner Florence Dolan – owner of the A-Boy Plumbing supply store on Main Street in Tigard, Oregon – together with her late husband, John Dolan, brought this action against the City of Tigard, contending the city's imposition of exactions on them violated the 5th Amendment to the U.S. Constitution by failing to substantially advance a legitimate state interest. During site development review of the Dolans' proposal to raze their existing store and build a new, larger store on their property, the city made findings that failed to directly and substantially demonstrate the increased intensity of the Dolans' use required the exactions. Disregarding the Dolans' argument that such findings were mandated by this Court's decision in *Nollan*, 483 U.S. at 834 n.3, 841 (1987), the city required them to dedicate to the city 7000 square feet of their commercial property as a condition of approval of their development.

QUESTIONS PRESENTED FOR REVIEW – Continued

The Oregon Supreme Court, affirming the judgment of the Oregon Court of Appeals and the Oregon Land Use Board of Appeals, held the city's exactions were not an unconstitutional taking because the federal constitutional takings/exactions standard of scrutiny does not require a substantial relationship between the adverse impacts of proposed use and government-imposed exactions, and the exactions imposed by the city were reasonably related to the adverse impacts of the Dolans' new store. The questions presented are:

1. Where a permit exaction is challenged as a taking, does *Nollan* require a "substantially related" degree of judicial scrutiny of the exaction and its "essential nexus" to the impacts of a proposed development, rather than the "reasonably related" degree of scrutiny used by the Oregon Supreme Court?

2. Where a permit exaction is challenged as a taking, did the Oregon Supreme Court err in holding that a legally sufficient nexus exists when the local government makes findings that its imposed exactions are reasonably related to the increased intensity in use of the subject property, even though those findings are at best merely *ipse dixit*, and at worst demonstrate only a potential increase in intensity of use, rather than a bona fide impact directly caused by the development?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding. In the proceedings below, John Dolan, husband of Petitioner Florence Dolan, was also a Petitioner, together with Florence Dolan. Mr. Dolan is now deceased, and is survived by his widow, Florence Dolan.

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DECISIONS BELOW

The decision of the Oregon Supreme Court is reported at 317 Or. 110, 854 P.2d 437 (1993), and is reproduced as Appendix (App.) A. The Appellate Judgment of the Oregon Supreme Court (SC No. S39393, filed July 28, 1993) is reproduced as Appendix B. The decision of the Oregon Court of Appeals is reported at 113 Or. App. 162, 832 P.2d 853 (1992), and is reproduced as Appendix C. The decisions of the Oregon Land Use Board of Appeals are reported at 22 Or. LUBA 617 (1992) and 20 Or. LUBA 411 (1991) and are reproduced as Appendices D and E respectively. The Notice of Appellate Judgment of the Oregon Land Use Board of Appeals (LUBA No. 91-161,

filed August 9, 1993) is reproduced at Appendix F. The relevant portions of Resolution 91-66, the Final Order of the City of Tigard (city), dated September 17, 1991, incorporating by reference Final Order 91-09 PC of the City of Tigard Planning Commission, dated July 15, 1991, are reproduced at Appendix G. Page references are to the version in the appendix.

JURISDICTION

The decision of the Oregon Supreme Court, review of which is sought on petition, was entered on July 1, 1993, and appellate judgment was entered on July 28, 1993. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

The statutes at issue are Oregon Revised Statutes (ORS) 197.010 (1991) and 197.175 (1991). The administrative rules at issue are Oregon Administrative Rule (OAR) 660-15-000(5), Open Spaces, Scenic and Historic Areas,

and Natural Resources (1975) and OAR 660-15-000(12), Transportation. The relevant portions of the statutes are set out at Appendix H, and the relevant portions of the goals are set out at Appendix I.

The ordinances at issue are the City of Tigard Comprehensive Plan, Volume 2, revised December, 1987 (plan), and Title 18 of the City of Tigard Community Development Code, revised February, 1989 (CDC). The relevant portions of these ordinances are set out at Appendices J and K, respectively.

Page references are to the versions in the appendix.

STATEMENT OF THE CASE

A. Procedural History

This action was originally filed with the Oregon Land Use Board of Appeals (LUBA)[1], and appealed the decision of the City of Tigard, imposing exactions during site development review, as violating the Federal Constitution. LUBA denied the appeal, holding the constitutional claim was not ripe because of failure to pursue a variance. Petitioner, together with her late husband, John T. Dolan, then reapplied to the city, seeking a variance. When the City Council, on September 19, 1991, denied their variance application, the Dolans again appealed to LUBA, reasserting their federal Constitutional claim.

[1] LUBA is an administrative hearings body consisting of 3 attorneys, appointed by the Oregon Governor, with exclusive jurisdiction over appeals of land use decisions made by local governments.

LUBA denied the Dolans' federal takings claim. From that decision, an appeal was taken to the Oregon Court of Appeals. On May 20, 1992, the Court of Appeals upheld the decision of LUBA. The Dolans in turn sought review by the Oregon Supreme Court. That court granted review, and, after oral argument on January 11, 1993, entered its *en banc* decision on July 1, 1993, affirming the judgment of the Oregon Court of Appeals. Justice Peterson wrote a dissent from the court's decision.

B. The Case

This is an inverse condemnation action. The property owner, Florence Dolan, contends that the decision of the City of Tigard (City), applying provisions of the City's Community Development Code (CDC) and imposing exactions during site development review, takes her property for public use without payment of just compensation.

Mrs. Dolan is the owner of a 1.67 acre commercial lot on Main Street in the City of Tigard, on which there is an existing 9700 square foot building used for the operation of a retail electric and plumbing supply store. The lot is contiguous to Fanno Creek, a small stream which runs adjacent to the lot. Part of the property is within the creek's 100-year floodplain. Mrs. Dolan, and her late husband, proposed to build a larger, 17,600 square foot, building, better suited to the needs of their business, and to raze the existing 9700 square foot building. *Dolan v. City of Tigard*. App. D-3.

In 1973, the State of Oregon adopted a statute requiring cities and counties to adopt comprehensive land use

plans in compliance with statewide land use goals developed by the state's Land Conservation and Development Commission (LCDC), an administrative agency created to direct and administer the state's land use regulatory system. Cities and counties were also required to adopt land use regulations to implement their comprehensive plans. App. H-2.

The LCDC, in 1975, developed statewide land use Goal 5 to conserve open space and protect natural and scenic resources. That goal required cities and counties to provide programs to protect, *inter alia*, "[l]and needed or desirable for open space." The Goal defined open space as including "any land area that would, if preserved and continued in its present use," "protect streams," "enhance the value to the public of neighboring parks . . . or other open space," and "enhance recreation opportunities." App. I-1. In 1975, the LCDC also adopted statewide land use Goal 12 to provide and encourage a safe, convenient and economic transportation system. Cities and counties were required to prepare transportation plans that "consider all modes of transportation including . . . bicycle and pedestrian," and to "avoid principal reliance on any one mode of transportation." App. I-4.

The city, in compliance with state law, and in conformance with the state land use goals, thereafter adopted a comprehensive land use plan, last revised in November, 1983. That plan included a finding that the city would develop policies to retain "a vegetative buffer along streams and drainageways, to reduce runoff and flood damage and provide erosion and siltation control." App. J-1. The policy adopted by the city to implement

that finding required, along Fanno Creek, "[t]he dedication of all undeveloped land within the 100-year floodplain plus sufficient open land for greenway purposes specifically identified for recreation within the plan." App. J-1, 2. The city described the land to be dedicated as "the backbone of the open space system." App. J-2. Finally, the plan's transportation section established that "[t]he City shall review each development request adjacent to areas proposed for pedestrian/bike pathways to . . . require the necessary easement or dedications for the pedestrian/bicycle pathways." App. J-2.

To implement these plan provisions, the city revised its zoning ordinance, Title 18 of its CDC, in February of 1989. That code, at Section 18.120.180.A.8, provided, for approval of site development plans for development in and adjacent to 100-year floodplains, the city shall "require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/ bicycle plan." App. K-1.

When the Dolans applied for site development review, the city, pursuant to CDC § 18.120.180.A.8, required the Dolans to dedicate to the city: (1) all of the portions of their lot lying within the 100-year floodplain, for use by the city as a greenway; and, (2) an additional 15 foot strip of property adjacent to and above the 100 year flood plain, for use for future reconstruction of a storm drainage channel and as a public pedestrian and bicycle pathway, and additionally to construct that pathway. App. D-6. The total land required to be dedicated

was approximately 7000 square feet, or about 10% of the total 1.67 acre parcel, of which 3600 square feet fell above the flood plain boundary. The Dolans argued these exactions were unconstitutional and sought a variance from them. In denying the variance, the city rejected their constitutional arguments.

There was, however, no direct, evidentiary linkage between the development of the Dolans' new store and the exacted dedications. The city's findings justified the greenway exaction by determining additional stormwater runoff, resulting not only from the Dolans' development, but also from "elsewhere within the Fanno Creek drainage basin, is expected to increase flow within the creek" and concluded the public needs the "ability to make channel modifications in this area to offset the increase in stream flow." App. G-40. The findings also justified the pedestrian and bicycle pathway dedications, by determining they were "reasonably related to the applicant's request to intensify the development of this site" because it was "reasonable to assume that customers and employees of the future uses of this site could u[illegible]lize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." App. G-24.

On review, the Oregon Supreme Court affirmed the decisions of LUBA and the Oregon Court of Appeals, which had rejected the Dolans' constitutional takings claim.[2] The court below stated that the city's site development review exactions were not a taking because the

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[2] In the majority opinion in the court below, Justice Van Hoomissen stated "Petitioners . . . did not challenge the

transportation impacts of, and the storm water runoffs from, the Dolans' new larger store, were reasonably related, respectively, to the requirements to dedicate land for a pedestrian and bicycle pathway, and a greenway. The court rejected the Dolans' alternative contention the "cause and effect" relationship or "essential nexus" of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) required a "substantial relationship" between the impacts of the development and the mitigation requirements. App. A-13. The Dolans' had also argued these exactions bore no relationship to their development because the same, identical, exactions were required of every development, regardless of size or intensity. The court disregarded this contention. *See* App. A-20 (Peterson, J., dissenting).

The court additionally rejected the argument that the exactions, imposed to permit the public to traverse the pedestrian and bicycle pathways, were a permanent physical occupation and a taking *per se* under the rule in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and reiterated in *Yee v. City of Escondido*, 503 U.S. ___, 112 S. Ct. 1522 (1992) (where government authorizes a physical occupation of property, or actually takes title, the takings clause generally authorizes compensation). Instead, the court held: "Such dedication conditions are not *per se* takings, because the occupation may occur only

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adequacy of the city's . . . findings or their evidentiary support in the record." App. A-7. However, the Dolans argued at every level of appeal below that the city's findings are not legally "sufficient to establish the requisite relationship between the impacts of the proposed development and the exactions imposed . . ." *Id.*

with the owner's permission. Petitioners may avoid physical occupation of their land by withdrawing their application for a development permit." App. A-11 n.8.

Justice Peterson dissented from the court's decision. In his view, the city failed to establish even a reasonable relationship between the impacts of the Dolans' use and the dedications imposed on them. He asserted he "would require [city] findings that *demonstrate* that the increased intensity of the use requires the exaction." App. A-25 (Peterson, J., dissenting) (emphasis in original).

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort, or of a Federal Court of Appeals. Under Rule 10.1(c), a ground for review exists when a state court has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. All four of these grounds for review are present in this case.

I.

THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT – HOW FAR CAN GOVERNMENTS GO IN EXACTING DEVELOPMENT DEDICATIONS TO SECURE PUBLIC IMPROVEMENTS?

The precedent established by the decision below throws the door wide open to a whole array of creative new development dedications to satisfy long-planned public improvements. Mrs. Dolan is not responsible to provide parkland, storm drainage, and pedestrian and bicycle pathways for the people of the city and, therefore, she cannot be singled out to bear the burden of completing the city's long-standing plans for greenways, storm drains, and pathways.

Exactions imposed as a condition to receiving a development permit can result in a regulatory taking in violation of the Fifth Amendment. *Nollan, supra*. The takings test applied in *Nollan* was whether the permit condition " 'substantially advance[s] legitimate state interests.' " *Id.*, 483 U.S. at 834 (brackets in original). For a development permit to meet this test, there must be an "essential nexus" between the permit condition and the adverse impacts of the proposed development. *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting) (must have a "cause and effect relationship between the property use . . . and the social evil"). In the absence of a cause-and-effect relationship, or "essential nexus," the permit condition is not a legitimate regulatory action but a means of "extortion" which works a taking in violation of the Fifth Amendment. *Nollan*, 483 U.S. at 837.

In his dissent below, Justice Peterson of the Oregon Supreme Court made clear the majority of the court had made a decision that was not based on an "essential nexus."

> From reading [the city's] order in this case, I am convinced Tigard decided that it needed a pedestrian/bicycle pathway and a flood control easement along Fanno Creek. One way of getting these, free of cost, is by requiring all owners who propose to change the use of their property to convey the easements to the city. That is what happened in this case.
>
> The findings here do not establish any cognizable remediable purpose attributable to the [Dolans' proposed] change in use. The conditions relating to the pedestrian/bicycle pathway and flood control and greenway easements are impermissible on the record made in this case.

App. A-29, 30 (Peterson, J., dissenting).

The Oregon Supreme Court's majority had concluded that the dedication provisions imposed by the city were "reasonably related to the impact of the expansion of their business." App. A-16. In making this conclusion, that court disregarded the admission of the city, in oral argument, that the conditions, that the petitioners dedicate a part of their land for a greenway and pedestrian/bicycle pathway, bore no relationship whatsoever to the scope or intensity of the impacts of the petitioners' proposed use. The presiding judge of the panel of the Oregon Court of Appeals asked counsel for the city: "The ordinance does not require any relationship between the work to be done by permit and the dedication of the

property?" Counsel for the city responded: "That's correct . . . " Audio R. Tape, *Dolan v. City of Tigard*, 113 Or. App. 162, 832 P.2d 853 (1992), argue 4-13-92, Cue No. 40.

The record also fails to disclose any "reasonable relationship." Even though the city's asserted relationship between the greenway exaction and the impact of the demolition and reconstruction of the petitioners' building is recited as being "reasonably related," the real underlying city purpose in requiring the petitioners to dedicate greenway land is: (1) To further the objectives of the city's *Master Drainage Plan*; and, (2) to provide for the physical relocation and expansion of the Fanno Creek channel to accommodate stormwater runoff from additional other development projected in the drainage basin. App. G-38, 39.

There is no evidence in the record that the greenway property exacted from petitioners is even reasonably related to any hypothetical increase in stormwater runoff caused by demolishing a 9700 square foot structure, and replacing it with a 17,600 square foot structure. The city's requiring the dedication of petitioners' land, and the construction of a pedestrian/bicycle pathway, also bears no reasonable relationship to the impacts of their proposed development. There is no "reasonable relationship" between the impacts on public pedestrian and bicycle movement created by the demolition and reconstruction of the retail sales building, and the requirement that the Dolans dedicate their private property to the city for a pedestrian/bicycle pathway.

The city's justification for this dedication was merely a subterfuge. The findings of the city's planning commission, adopted by the city council in its decision, found the

exactions reasonably related to the development of the site, found it reasonable to assume and reasonable to expect the development would have anticipated transportation impacts, and concluded the exactions could offset some of those impacts. App. G-24.

The "reasonable" "expectations" and "anticipations" in the city's findings were nothing more "than an exercise in cleverness and imagination." *Nollan*, 483 U.S. at 841. There was no reasonable relationship between the city's conditions and the impacts of the petitioners' proposed use. By virtue of the Oregon Supreme Court's decision, the city was authorized to exact, from Mrs. Dolan, land to help complete an already existing, and partially completed, greenway and pathway systems by what Justice Scalia termed "an out-and-out plan of extortion." *Id.* at 837 (citations omitted).

The city's true purpose in requiring dedication of the petitioners' land for, and construction of, a pedestrian/bicycle pathway was to achieve general public benefit[3], not to offset the current and future adverse effects of the demolition and reconstruction of the retail sales building. The city's comprehensive plan required outright dedication regardless of impacts, or the lack thereof. App. G-25.

In sum, the decision of the Oregon Supreme Court below, made under the federal Constitution's Fifth Amendment, sanctions the city's requirement that the

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[3] The record makes clear that the dedication was intended to meet "the City's adopted policy of providing a continuous pathway system intended to serve the general public good." App. G-26.

Dolans dedicate their land for a greenway and a pedestrian/bicycle pathway, and then construct that pathway. That decision disregards the city's clear intent to secure public improvements by forced dedications, and was made in spite of the city's failure to demonstrate any specific relationship between the impacts of either storm-water runoff or pedestrian and bicycle use and demolishing and then replacing the petitioners' retail sales building. The city has admitted as much.

Holding the city's conclusory and speculative findings to meet the "essential nexus" of *Nollan* is tantamount to sanctioning essentially every municipal exaction where the government staff can hypothesize some remote or indirect, cumulative adverse consequence of development. The city's findings are grossly inadequate when compared to those found by the Court of Appeals for the Ninth Circuit to satisfy the "essential nexus" of *Nollan*. In *Commercial Builders v. Sacramento*, 941 F.2d 872, 873 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992), the city's impact fee exaction ordinance, found to be constitutional, was supported by a detailed study by an outside consultant that identified the specific impacts generated by new developments in terms of numbers of new low-income workers and the government financial burden, in thousands of dollars, per worker. The exaction was set based on that exhaustive study.

In the instant case, Justice Peterson, dissenting from the Oregon Supreme Court's opinion, described the inadequacy of the city's findings, giving as an example the justification of the dedication for the greenway and storm drainage: "All these findings establish is that there will be some increase in the amount of storm water runoff

from the site. A thimbleful? The constitution requires more than that." App. A-26 (Peterson, J., dissenting). If the city had, by a study, determined how much storm water entered Fanno Creek, and specifically how much more runoff would be caused by the Dolans' new store, it might have been able to constitutionally justify the dedication for the storm drain and greenway. It made no such study. If it had, by a study, determined the number of additional pedestrians, bicyclists, and automobiles the new store would generate, and how those numbers compared to the existing traffic loads on city streets, sidewalks, and bikepaths, it might have been able to justify the pedestrian and bikepath dedication. It made no such study.[4]

In the absence of such detailed studies supporting specific city findings of direct impacts, the court's opinion below licenses a creative and cost-free method of providing public recreation, storm drainage, and transportation improvements – extort the land for those improvements from development applicants.

In his dissent to the decision of the Oregon Supreme Court in *Dolan*, Justice Peterson argued for heightened scrutiny of such exaction schemes: "I read the federal

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[4] The city's conclusory findings "justify" the dedication of the land within the 100-year floodplain of Fanno Creek for a greenway on the basis of storm water runoff and increased flows in the creek, even though a principal purpose of the greenway was recreation. *See* App. J-1, 2. However, the city totally failed to justify how a new plumbing store was even rationally related to the dedication of greenway land for public recreation.

precedents to require a high threshold that the government must meet in showing the exaction is needed because of intensified land use by the landowner." App. A-29 (Peterson, J., dissenting). The majority of the Oregon Supreme Court rejected that standard, and, by doing so, distorted the "essential nexus" of *Nollan* beyond recognition, depriving it of all vitality and meaning.

Cities will always need parks, storm drain improvements and transportation systems. If building a new commercial building is accepted as a sufficient nexus to impose on the developer the dedication of land, and construction of facilities, based on theoretical and hypothesized findings, without any direct relationship to the actual impacts of the new building, then there is no meaning to "essential nexus." All public improvements are remotely and tangentially related to new commercial buildings. The decision below sets a dangerous and far-reaching precedent by allowing cities to extort public improvements, planned and codified years before in master plans, by exacting those improvements from landowners seeking to develop their properties, just because those properties are in proximity to the sites planned for the improvements. According to the Oregon Supreme Court, those exactions meet constitutional scrutiny even if unrelated to the direct consequences of proposed developments. Petitioner respectfully urges this Court to grant the Petition to establish that local governments must justify conditions of approval by explicit findings showing those conditions are directly attributable to the specific impacts of a proposed development.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT, AND OTHER STATE AND FEDERAL COURTS, REGARDING THE DEGREE OF SCRUTINY IN TAKINGS/EXACTION CASES

A. The Ruling of the Oregon Supreme Court Conflicts with Precedent Set by This Court in *Nollan* and *Yee*.

The Oregon Supreme Court has sanctioned a nexus standard which disregards the necessary cause-and-effect relationship required by *Nollan* to impose development dedications, and has adopted a construction of *Yee* that deprives of all meaning and vitality this Court's *Loretto* decision governing *per se* takings for permanent physical occupations of private property.

1. *Nollan* Requires a "Substantially Related" Degree of Scrutiny.

By adopting a "reasonably related" degree of scrutiny, the court below, despite the Dolans' argument, ignored this Court's *Nollan* precedent that the "essential nexus" requires a heightened degree of scrutiny – a "substantially related" connection between the proposed development and the adverse public impacts occasioned by that development. App. A-9-13.

The nexus approved by the court below is one which utterly fails to establish a substantial relationship between a proposed project and the adverse public impacts which a permit condition is designed to alleviate. Indeed, the nexus analysis conducted by the City of

Tigard did not even attempt to establish that the Dolans' dedication of land was directly and proximately necessitated by the stormwater runoff and additional pedestrian and bicyclist traffic which their enlarged commercial facility would engender. All the city could find was the dedication was "reasonably related" to the stormwater runoff and pedestrian and bicyclist traffic that *would be expected* to be caused by the new facility. This Court's *Nollan* majority's holding on the nexus requirement establishes a heightened level of scrutiny for the cause and effect relationship between development impacts and conditions of approval. This heightened level of scrutiny was clearly delineated by Justice Scalia, responding to the dissent of Justice Brennan[5]:

> Even if the [California Coastal] Commission had made the finding that JUSTICE BRENNAN proposes, however, it is not certain that it would suffice. *We do not share JUSTICE BRENNAN's confidence that the Commission "should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access," post* at 862, that will avoid the effect of today's decision. We view the Fifth Amendment's Property Clause to

[5] In dissent, Justice Brennan had argued: "The Court's insistence on a *precise fit between the forms of burden and condition on each individual parcel* along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate." 483 U.S. at 847 (Brennan, J., dissenting) (emphasis added). He later characterized the *Nollan* Court's opinion as an "unusual demand for a precise match between the condition imposed *and the specific type of burden on access created by the appellants*." *Id.* at 849 (emphasis added).

> be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction . . . .

Nollan, 483 U.S. at 840-841 (emphasis in original).

Justice Scalia thus made it apparent that a heightened level of scrutiny must be applied in determining the constitutionality of development exactions – there must be demonstrated a specific connection between permit conditions and impacts. The Oregon Supreme Court disregarded this principle.

In view of the Oregon Supreme Court's construction of the nexus requirement, it is of great importance to the citizens of the United States, and of the State of Oregon, that this Court grant this Petition, and establish uniformly that a precise fit is constitutionally required between an exaction and the burdens or impacts of proposed development, in order to meet this Court's *Nollan* nexus standard.

2. *Nollan, Yee* and *Loretto* Hold that Permanent Physical Occupations Resulting from Exactions Imposed on Development Applications Are *Per Se* Takings.

This Court has made clear that physical invasions of private property violate the Fifth and Fourteenth Amendments to the U.S. Constitution. When the government either permanently occupies, or requires property owners

to allow third parties to permanently occupy private property, and does not compensate owners of that property for the occupation, the government has taken private property in violation of the federal Constitution. *Loretto*, 458 U.S. at 427 (when physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred). *Yee*, 112 S. Ct. at 1526 (where government authorizes a physical occupation of property, or actually takes title, the takings clause generally authorizes compensation). *Nollan*, 483 U.S. at 831-832 (taking occurs when permanent physical occupation is achieved by individuals being given permanent right to traverse private real property). A permanent physical occupation is a *per se* taking in violation of the federal constitution. As such, the "intrusion [is] of such an 'unusually serious character' that it constitutes a taking 'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.' " Peterson, *The Takings Clause*, 77 Calif. L. Rev. 1299, 1333 (1989) (footnotes omitted).

The city, by requiring the petitioners to dedicate their private land for a public greenway and pedestrian and bicycle pathway, has invaded, and permanently occupied, the property of the petitioners. The city's interference with the petitioners' property is with the petitioners' right to exclude others from that property, and that interference is achieved by forcing the dedication of land for a the greenway and pathway. Just as in the public access easement in *Nollan*, the public, on foot and on bicycle, will pass across the petitioners' land. This Court, in *Nollan*, recognized it would be unconstitutional under the Federal Constitution for government, either dependent

on, or independent of, development proposals, to compel landowners to accede to the outright physical occupation of their private lands by the public. *Nollan*, 483 U.S. at 831.

The decision of the Oregon Supreme Court, that there was no physical invasion because the Dolans voluntarily assented to the occupation of their land by applying to expand their plumbing store, misconstrues this Court's decision in *Yee* and ignores this Court's holding in *Nollan*. In construing *Yee*, the court below analogized the Dolans' situation to that of the petitioners in *Yee*, the mobile home park owners: "Because the park owner in *Yee* could have evicted the tenants and used the property for another purpose, any physical invasion that might occur would not be the result of forced acquiescence." App. A-11 n.8. The court concluded there was no unconstitutional permanent physical occupation because the Dolans "may avoid physical occupation of their land by withdrawing their application for a development permit." *Id.*

This construction is contrary to this Court's *Yee* decision. In *Yee*, where a rent-control ordinance was challenged on its face, this Court rejected the petitioners' claim of physical invasion because "no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by government." *Yee*, 112 S. Ct. at 1528. However, this Court also observed: "A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." *Id.* at 1529.

It is precisely that compulsion over objection which is at issue in the instant case. The city is applying a regulation, which, on its face, requires the Dolans, if they want to build a new store, to allow the public to permanently traverse and occupy 7000 square feet of previously private property on which the Dolans had an unconditional right to exclude others. Here the city compelled the Dolans to give up more than an easement for the permanent passage and occupation by the public. The city compelled the Dolans to relinquish their fee simple interest and dedicate that property to the city outright. Such compulsion is a *per se* taking in violation of the Fifth Amendment.

Furthermore, in *Nollan* this Court made it clear that "the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary 'exchange,' that we found to have occurred in *Monsanto*. *Nollan*, 483 U.S. at 834 n.2 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984)).

Thus, it was plain error for the Oregon Supreme Court to conclude there was no taking in violation of the Fifth Amendment, due to permanent physical occupation of the Dolans' private property, merely because the city, in its plan and ordinance, had made dedication of private property, for the public to occupy and traverse, a condition of development approval. In no way can the Dolans be said to have voluntarily assented to such occupation merely because they had made a development application to which that condition applied. The situation is no different than that addressed by this Court in *Nollan*. Even though the Nollans could have avoided the exaction

imposed by the California Coastal Commission by withdrawing their permit application, this Court nonetheless found the commission's exaction to impose an unconstitutional permanent physical occupation of their land.

It is patently outrageous to conclude, as the Oregon Supreme Court did, that an otherwise blatantly unconstitutional restriction under the Fifth Amendment may avoid being held unconstitutional merely by being attached to a permit as a condition of approval. An unconstitutional restriction attached to a permit would not survive judicial scrutiny if it were a restriction on free speech, or free exercise of religion, or the right to due process.

B. The Decision Below Conflicts with Interpretations of *Nollan* by Both Federal and State Courts.

The decision of the Oregon Supreme Court directly conflicts with decisions of other state courts that have interpreted the nexus required between conditions and impacts in light of the *Nollan* decision.

A broad application of the "substantial advancement" standard by the highest court in New York State was presented in *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), where the New York Court of Appeals interpreted *Nollan* as requiring "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships." *Id.* at 1068. *See also Steinbergh v. City of Cambridge*, 604 N.E.2d 1269, 1276 (Mass. 1992) (requirement that regulation substantially advance a state interest

may express higher standard of scrutiny than rational basis test).

Another case that interprets *Nollan* as requiring a "substantial relationship" between impacts and exactions is *Surfside Colony v. California Coastal Commission*, 226 Cal. App. 3d 1260 (1991). In *Surfside*, the California Court of Appeal determined that *Nollan* "changed the standard of constitutional review in takings cases." *Id.* at 1270. It held that the new standard should "be described as 'substantial relationship,' or 'heightened scrutiny,' " and that "it is clear the rational basis test . . . no longer controls." *Id. See also Batch v. Town of Chapel Hill*, 376 S.E.2d 22 (N.C.App. 1989), *rev'd on other grounds* 387 S.E.2d 655 (N.C. 1990) (to substantially advance state interest, condition imposed must be proportionately related to impact of development).

The decision of the Oregon Supreme Court also conflicts with a decision by a panel of the Court of Appeals for the Ninth Circuit, and decisions by the U.S. District Courts for Nevada, and the Northern District of Illinois, cases all construing this Court's decision in *Nollan*. *See Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 582-583 (9th Cir. 1991) (relationship between the means and the ends must be closer for the purposes of takings clause analysis than for due process analysis). *See also Leroy Land Dev. v. Tahoe Regional Planning Agency*, 733 F. Supp. 1399, 1401 (D.Nev. 1990), *rev'd* 939 F.2d 696 (9th Cir. 1991) (fairly close nexus required between regulatory conditions and burden created by proposed development); *Amoco Oil Co. v. Village of Schaumburg*, No. 91 C 4973, 1992 WL 229591 (N.D.Ill. Sept. 11, 1992) (actual

dedication of property merits strictest scrutiny in reviewing nexus between need served by dedication condition and public burden created by development project).

III.

THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY AMONG THE FEDERAL COURTS AND STATE COURTS OF LAST RESORT REGARDING THE HEIGHTENED DEGREE OF SCRUTINY IN TAKINGS/EXACTION CASES

State courts from New York and Massachusetts to California, and federal courts in Nevada, Illinois and California, have all construed this Court's *Nollan* opinion to require heightened scrutiny, or a "substantial relationship," between development conditions and the burdens or impacts of a proposed development.

On the other hand, the Supreme Court of New Jersey, the U.S. District Court for the District of Oregon, and a panel from the Court of Appeals for the Ninth Circuit[6], have held, as the Oregon Supreme Court did below, that *Nollan* does not command a heightened degree of scrutiny; there need only be a "reasonable relationship," akin to the "rational basis" scrutiny in due process cases, between conditions and development impacts. In 1992, the Supreme Court of New Jersey held that, in determining whether a regulatory restriction substantially advanced a legitimate state interest, there was required a substantial relationship between a legitimate government

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[6] A different panel from the Ninth Circuit's 3-judge panel that decided *Azul Pacifico, supra*.

interest and the regulatory restrictions, but the adverse impacts of development need only be "reasonably determined on adequate evidence to be . . . inimical to . . . [the legitimate government interest]." *Bernardsville Quarry v. Bernardsville Borough*, 608 A.2d 1377, 1383-1384 (N.J. 1992).

In *Pengilly v. Multnomah County*, 810 F.Supp. 1111, 1113 (D.Or. 1992), the District Court held this Court's decision in *Nollan* did not require that individual proposed developments must be shown to have deleterious impact before conditions can be imposed on them. The District Court upheld a local government policy that required dedication of additional right of way to the county as a condition of approval of every new residence on a road.

In *Commercial Builders*, Judge Schroeder, writing for a panel of the Ninth Circuit, held the system-development charge ordinance of the City of Sacramento was not unconstitutional because

> The burden assessed against the developers . . . bears a *rational relationship* to a public cost closely associated with such development. . . .
>
> . . . .
>
> *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld.

941 F.2d at 874-875.

Thus, Judge Schroeder held there must only be a rational relationship between the exaction imposed on a development and the "public cost" or "social ill" caused by the development. *Id.* at 874.

It was this same 3-judge panel of the Ninth Circuit that, a month before making its decision in *Commercial Builders*, reversed the *Leroy Land* decision, *supra*, of the U.S. District Court for the District of Nevada, in *Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696 (9th Cir. 1991) (there must be substantial relationship between exactions and the stated government interest, not the development's impacts).

These cases show there is a distinct split of opinion, not only between state courts of last resort, but between federal courts, and, indeed, even between different panels of the Ninth Circuit, regarding this Court's "essential nexus" holding in *Nollan*. The direct conflict presented by these cases on such a significant issue should be resolved by this Court.

IV.

THE HEIGHTENED SCRUTINY ISSUE IS AN IMPORTANT QUESTION OF LAW WHICH SHOULD BE SETTLED BY THIS COURT

In order for the nation's lower courts to properly adjudicate takings claims that land use decisions fail to substantially advance a legitimate state interest, it is critical they apply correct degree of scrutiny to the "essential nexus." Indeed, the level of scrutiny is the key factor in determining whether the Fifth Amendment's Takings

Clause provides protection to property owners from government exaction schemes. This is clearly shown by the decision below, where the Oregon Supreme Court's use of a "reasonably related" level of review easily led to a decision upholding the dedication exaction even though the alleged nexus was only hypothetical and speculative. Any close reading of the record, like that conducted by Oregon Supreme Court Justice Peterson, dissenting, establishes that a cause and effect nexus never existed.

This Court, in *Nollan*, characterized the government's abuse of its permitting authority as an extortion and a leveraging of the police power. *Nollan*, 483 U.S. at 837. This Court also has made clear that the protection of private property is essential to maintain all other civil rights protected by the U.S. Constitution. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Lower courts are never going to prevent regulatory abuses by government, and provide essential protection to private property, if they do not give heightened scrutiny to the substance of the government's action. The instant case illustrates the need for an "essential nexus" of a "substantial relationship" between the local government's permitting conditions and the specific adverse impacts of a development. The split of authority concerning the appropriate degree of scrutiny under the Takings Clause cries out for resolution by this Court – it is a matter of exceptional importance, and merits review by this Court.

CONCLUSION

The City of Tigard's comprehensive plan and land use regulations are intended to achieve completion of the city's greenway and pedestrian/bicycle pathways, parts of which have already been acquired by the city, by extorting land from persons proposing any kind of development near Fanno Creek. This is done without regard to the impacts of that development. Nonetheless, completing the city's park and transportation system is a responsibility of the city's residents as a whole. Property owners who desire legitimate use of their lands – reasonable and beneficial uses which meet all standards for approval – should not be singled out to finance the costs of providing public recreational and transportation facilities for the city's residents.

In upholdi. g the city's scheme, the Oregon Supreme Court overlooked the very purpose of the Federal Constitution's Takings Clause. That purpose is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan*, 483 U.S. at 835-836 n.4 (citation omitted). The decision of the court below completely ignores this purpose.

This case has been closely watched by property owners and builders who are already heavily burdened with an array of permit conditions. The precedent established by the Oregon Supreme Court licenses the extortionate activities of local governments operating under comprehensive plans and land use regulations. The extent to which property owners can be subjected to provision of public improvements as conditions of

approval for developments is an issue of exceptional importance and wide-ranging impact.

Petitioner respectfully urges this Court to grant the Petition for Writ of Certiorari.

DATED: September 29, 1993.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

John T. DOLAN
and Florence Dolan,
Petitioners on Review,

v.

CITY OF TIGARD,
Respondent on Review.

(LUBA 91-161; CA A73769; SC S39393)

In Banc

On review from the Court of Appeals.*

Argued and submitted January 11, 1993.

David B. Smith, Tigard, argued the cause and filed the petition for petitioners on review.

James M. Coleman, of O'Donnell, Ramis, Crew & Corrigan, Portland, argued the cause and filed the response for respondent in review.

Daniel J. Popeo and Paul D. Kamenar, Washington, D.C., and Gregory S. Hathaway, of Garvey, Schubert & Barer, Portland, filed a brief *amicus curiae* for Washington Legal Foundation.

Timothy J. Sercombe and Edward J. Sullivan, of Preston, Thorgrimson, Shidler, Gates, & Ellis, Portland, filed a brief *amicus curiae* for 1000 Friends of Oregon.

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* Judicial review from Land Use Board of Appeals, 22 LUBA 617 (1992). 113 Or App 162, 832 P2d 853 (1992).

Ronald A. Zumbrun and Robin L. Rivett, Sacramento, California, and Richard M. Stephens, Bellevue, Washington, filed a brief *amicus curiae* for Pacific Legal Foundation.

VAN HOOMISSEN, J.

The decision of the Court of Appeals and the order of the Land Use Board of Appeals are affirmed.

Peterson, J., dissented and filed an opinion.

VAN HOOMISSEN, J.

Petitioners in this land use case seek review of a Court of Appeals' decision affirming a Final Opinion and Order of the Land Use Board of Appeals (LUBA) in favor of respondent City of Tigard (city). *Dolan v. City of Tigard*, 113 Or App 162, 832 P2d 853 (1992). The issue is whether city has demonstrated the required relationship between the conditions that it attached to its approval of petitioners' proposed land use and the expected impacts of that land use.[1] Petitioners argue that, because city failed to demonstrate an "essential nexus" or a "substantial relationship" between the exactions demanded by city and the impacts caused by their proposed development, city's exactions constitute a "taking" under the Fifth Amendment of the federal constitution.[2] City responds

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[1] In land-use cases, this sometimes is called the relationship between the "exactions" and the "impacts."

[2] The Takings Clause of the Fifth Amendment to the Constitution of the United States provides:

> "[N]or shall private property be taken for public use, without just compensation."

that it need only show a "reasonable relationship" between the imposition of the conditions and the legitimate public interest advanced. For the reasons that follow, we affirm the Court of Appeals' decision.

Petitioners own 1.67 acres of land in downtown Tigard. The land is within city's "central business district" zone and is subject to an "action area" overlay zone (CBD-AA zone). The land's current use is as a retail electric and plumbing supply business, a general retail sales use.

Petitioners applied to city for a permit to remove an existing 9,700-square foot building and to construct a 17,600-square foot building in which to relocate the electric and plumbing supply business and to expand their parking lot (phase I). Petitioners eventually intend to build an additional structure and to provide more parking on the site (phase II); however, the exact nature of that additional expansion is not specified. Petitioners' proposed intensified use (phase I) is permitted outright in the CBD zone; however, the AA overlay zone, which

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That Clause is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Penn Central Trans. Co. v. New York City*, 438 US 104, 122, 98 S Ct 2646, 57 L Ed 2d 631 (1978). *See* Annot, *Supreme Court's View As to What Constitutes a "Taking" Within Meaning of Fifth Amendment's Prohibition Against Taking of Private Property For Public Use Without Just Compensation*, 89 L Ed 2d 977 (1988).

Petitioners also brought a challenge under Article I, section 18, of the Oregon Constitution (Takings Clause). Before this court, however, they expressly have limited themselves to a federal claim. Therefore, we do not address any Oregon constitutional issue.

implements the policies of the Tigard Community Development Code, allows city to attach conditions to the development in order to provide for projected transportation and public facility needs.

City granted petitioners' application, but required as conditions that petitioners dedicate the portion of their property lying within the 100-year floodplain for improvement of a storm drainage system and, further, that they dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.[3] Petitioners sought a variance from those conditions, which city denied.[4]

In its 27-page final order, city made the following pertinent findings that petitioners do not challenge concerning the relationship between the dedication conditions and the anticipated impacts of petitioners' project:

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[3] City's decision includes the following relevant condition:

> "1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (*i.e.*, all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area."

The dedication required by that condition comprises about 7,000 square feet, or approximately 10 percent of the subject real property.

[4] The applicants requested variances to Community Development Code standards requiring among other things dedication of area of the subject parcel that is within the 100-year floodplain of Fanno Creek and dedication of additional area adjacent to the 100-year floodplain for a pedestrian/bicycle path.

> "*Analysis of Variance Request*. The [City of Tigard Planning] commission does not find that the requirements for dedication of the area adjacent to the floodplain for greenway purposes and for construction of a pedestrian/bicycle pathway constitute a taking of applicant's property. Instead, the Commission finds that the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.
>
> " * * * * *
>
> "At this point, the report will consider the applicant's request from the requirement to dedicate

portions of the site within the 100-year floodplain of Fanno Creek for storm water management purposes. The applicant's *Statement of Justification for Variance* * * * does not directly address storm water draining concerns * * * .

"The Commission does not find that the requirements for dedication of the area within the floodplain of Fanno Creek for storm water management and greenway purposes constitutes a taking of the applicant's property. Instead, the Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site, thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, * * * the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." City of Tigard Planning Commission Final Order No. 91-09 PC at 13, 20-21.

On petitioners' appeal, the Tigard City Council approved the Planning Commission's final order.

Petitioners appealed to LUBA. They did not challenge the adequacy of city's above quoted findings or their evidentiary support in the record. Rather, petitioners argued that city's dedication requirements are not related to their proposed development and, therefore, that those requirements constitute an uncompensated taking of their property under the Fifth Amendment.

In considering petitioners' federal taking claim, LUBA assumed that city's findings about the impacts of the proposed development were supported by substantial evidence. *Dolan v. City of Tigard*, 22 Or LUBA 617, 626 n 9 (1992). Accordingly, LUBA considered only whether those findings were sufficient to establish the requisite relationship between the impacts of the proposed development and the exactions imposed, *i.e.*, do city's findings support city's action? LUBA stated:

> "Petitioners do not contend that establishing a greenway in the floodplain of Fanno Creek for storm water management purposes, and providing a pedestrian/bicycle pathway system as an alternative means of transportation, are not legitimate public purposes. Further, petitioners do not challenge the sufficiency of the 'nexus' between these *legitimate public purposes* and the *condition* imposed requiring dedication of portions of petitioners' property for the greenway and pedestrian/bicycle pathway. Rather, petitioners' contention is that under both the federal and Oregon Constitutions, the relationship between the *impacts* of the proposed development and the *exactions* imposed are insufficient to justify requiring dedication of petitioners' property without compensation." *Id.* at 621 (emphasis in original).

LUBA concluded:

> "In view of the comprehensive Master Drainage Plan adopted by respondent providing for use of the Fanno Creek greenway in management of storm water runoff, and the undisputed fact that the proposed larger building and paved parking area on the subject property will increase the amount of impervious surfaces and, therefore, runoff into Fanno Creek, we conclude there is a 'reasonable relationship' between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway.
>
> "Furthermore, the city has adopted a Comprehensive Pedestrian/Bicycle Pathway Plan which provides for a continuous network of pedestrian/bicycle pathways as part of the city's plans for an adequate transportation system. The proposed pedestrian/bicycle pathway segment along the Fanno Creek greenway on the subject property is a link in that network. Petitioners propose to construct a significantly larger retail sales building and parking lot, which will accommodate larger numbers of customers and employees and their vehicles. There is a reasonable relationship between alleviating these impacts of the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation." *Id.* at 626-27.

LUBA held that the challenged conditions requiring dedication of portions of petitioners' property did not constitute an unconstitutional taking under the Fifth Amendment. *Id.* at 627.

The Court of Appeals affirmed, rejecting petitioners' contention that in *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), the Supreme Court had abandoned the "reasonable relationship" test for a more stringent "essential nexus" test. *Dolan v. City of Tigard, supra*, 113 Or App at 166-67.[5]

On review,[6] petitioners first argue that city must meet a higher standard than a "reasonable relationship,"

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[5] In *Nollan*, the California Coastal Commission conditioned a permit to the plaintiffs to replace a bungalow on their beachfront lot with a larger house on allowing a public easement to go across their beach, which was located between two public beaches. The California Court of Appeals had found that there was no taking, because the condition did not deprive the landowners of all reasonable use of their property. In an opinion written by Justice Scalia, the *Nollan* majority concluded that none of the designated purposes was substantially advanced by preserving a right to public access:

> "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to view the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house." *Nollan v. California Coastal Comm'n*, 483 US 825, 838-39, 107 S Ct 3141, 97 L Ed 2d 677 (1987).

[6] We review pursuant to ORS 197.850(9), which provides:

> "The court may affirm, reverse or remand the order. The court shall reverse or remand the order only if it finds:
>
> "(a) The order to be unlawful in substance or procedure, but error in procedure shall not be cause for reversal or remand unless the court shall find that

that there must be an "essential nexus" or "substantial relationship" between the impacts of the development and the dedication requirements; otherwise, imposing exactions as a condition of land use approval is an unconstitutional taking. They rely on *Nollan v. California Coastal Comm'n, supra.*[7] Petitioners argue that, because city has not demonstrated an essential nexus between its exactions and the demands that petitioners' proposed use will impose on public services and facilities, the requisite substantial relationship is missing and, therefore, that the exactions imposed on them by city constitute a taking

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substantial rights of the petitioner were prejudiced thereby;

"(b) The order to be unconstitutional; or

"(c) The order is not supported by substantial evidence in the whole record as to the facts found by the board under ORS 197.830(13)."

[7] In *Nollan*, the Supreme Court stated:

"Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements." 483 US at 834-35 (footnote omitted).

The Supreme Court generally has eschewed any "set formula" for determining when and under what circumstances a given regulation would be seen as going "too far" for purposes of the Fifth Amendment, preferring to engage in essentially *ad hoc*, actual inquiries. *Lucas v. So. Carolina Coastal Council*, 505 US ___, 112 S Ct 2886, 120 L Ed 2d 798 (1992); *see McDougal v. County of Imperial*, 942 F2d 668, 677-78 (9th Cir 1991) (takings analysis involves essentially *ad hoc*, factual inquiries).

under the Fifth Amendment. As a fallback position, petitioners argue that city cannot demonstrate even a "reasonable relationship" between their development's impacts and city's exactions.[8]

City responds that the "reasonable relationship" test which was widely applied in regulatory takings cases before the Supreme Court's decision in *Nollan* was not abandoned in *Nollan*. Under that test, city asserts, the dedication conditions that it imposed on petitioners do not constitute a taking under the Fifth Amendment.

A land-use regulation does not effect a "taking" of property, within the meaning of the Fifth Amendment

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[8] Petitioners also argue that, because city's dedication conditions would require permanent physical occupation of a portion of their property, they amount to a *per se* taking. That argument is not well taken. Such dedication conditions are not *per se* takings, because the occupation may occur only with the owner's permission. Petitioners may avoid physical occupation of their land by withdrawing their application for a development permit.

The Supreme Court's analysis in *Yee v. City of Escondido*, 503 US ___, 112 S Ct. 1522, 118 L Ed 2d 153 (1992), settles this point. In *Yee*, the owner of a mobile home park asserted a *per se* taking when the local city council adopted a rent control ordinance that, as the park owner argued, transferred a discrete interest in land from the park owner to his tenants. The *Yee* court held:

"The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.' " 118 L Ed 2d at 165 (emphasis in original).

Because the park owner in *Yee* could have evicted the tenants and used the property for another purpose, any physical invasion that might occur would not be the result of forced acquiescence. *Ibid.*

prohibition against taking private property for public use without just compensation, if it substantially advances a legitimate state interest and does not deny an owner economically viable use of the owner's land. *Nollan v. California Coastal Comm'n, supra,* 483 US at 835-36; *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 US 470, 495, 107 S Ct 1232, 94 L Ed 2d 472 (1987); *Agins v. City of Tiburon,* 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980). Requiring an uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, *Nollan, supra,* 483 US at 834.

Before the Supreme Court's decision in *Nollan,* federal and state courts struggled to identify the precise connection that must exist between the conditions incorporated into a regulation and the governmental interest that the regulation purports to further if the regulation is to be deemed to "substantially advance" that interest. In the midst of a range of tests set forth by various courts, the Ninth Circuit Court of Appeals concluded in *Parks v. Watson,* 716 F2d 646, 652 (9th Cir 1983), that, at the very least, a condition requiring an applicant for a governmental benefit to forego a constitutional right is unlawful if the condition is not rationally related to the benefit conferred. By way of example, the *Parks* court discussed "subdivision exaction" cases, where a city allows a developer to subdivide in exchange for a contribution. In such cases, the court noted, "there is agreement among the states 'that the dedication should have some reasonable relationship to the needs created by the subdivision.' " *Id.* at 653. Thus, under the *Parks* analysis, exactions and impacts must be "reasonably related." In *Parks,* the court held that the exactions had "no rational relationship to

any public purpose related to the [impacts of the development]" and, therefore, that the exactions could not be required without just compensation. *Id.* at 653.

In *Nollan,* the Court did not purport to abandon the generally recognized "reasonably related" test and, in fact, noted that its approach was "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." 483 US at 839 (citing a long list of exaction cases, beginning with *Parks v. Watson, supra*). The *Nollan* court stated:

> "We can accept, for purposes of discussion, the Commission's proposed test [the 'reasonably related test'] as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailored standards." *Id.* at 838.

Thus, we are unable to agree with petitioners that the *Nollan* court abandoned the "reasonably related" test.[9]

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[9] We are not alone in interpreting *Nollan* in this manner. In *Commercial Builders v. Sacramento,* 941 F2d 872 (9th Cir 1991), *cert den* 112 S Ct 1997 (1992), the Ninth Circuit also held that *Nollan* did not demand any different level of scrutiny than the one it used in *Parks v. Watson, supra:*

> "As a threshold matter, we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to this Ordinance. The *Nollan* Court specifically stated that it did not have to decide 'how close a "fit" between the condition and the burden is required' * * * . It also noted that its holding was 'consistent with the approach taken by every other court [*sic*] has considered the question,' citing *Parks* as the lead case in its string cite. * * *

We recognize, however, that the *Nollan* court's application of that test does provide some guidance as to how closely "related" exactions must be to impacts. For example, the *Nollan* court stated that the evidence constitutional propriety of an exaction disappears

> "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury." *id.* at 837.[10]

"We therefore agree that *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld." *Id.*, 941 F2d at 874-75.

[10] In *Nollan*, the Supreme Court said:
"We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." 483 US at 841.

Petitioners read that passage as indicating that in *Nollan* the Supreme Court abandoned the "reasonably related" test for a more stringent "essential nexus" test.[11] We do not read *Nollan* that way.

The quoted passage indicates that, for an exaction to be considered "reasonably related" to an impact, it is essential to show a nexus between the two, in order for the regulation to substantially advance a legitimate state interest, as required by *Agins v. City of Tiburon, supra,* 447 US at 260. In *Nollan,* the Court stated that, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Nollan v. California Coastal Comm'n, supra,* 483 US at 837 (citations omitted). *Nollan,* then, tells us that an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve. *See Dept. of Trans. v. Lundberg,* 312 Or 568, 578, 825 P2d 641, *cert den* 113 S. Ct. 467 (1992) (sidewalk dedication requirement serves the same legitimate governmental purposes that would justify denying permits to develop commercially zoned properties).

See Lucas v. So. Carolina Coastal Council, supra, 120 L Ed 2d at 813 (the Fifth Amendment is violated when land use regulation does not substantially advance legitimate state interests or denies an owner all economically viable use of land).

[11] The term "substantial relationship" is not used in *Nollan,* although the Court did cite *Agins v. City of Tiburon,* 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980), for the proposition that a regulation must "substantially advance legitimate state interests." *Nollan, supra,* 483 US at 834.

In this case, we conclude that city's unchallenged factual findings support the dedication conditions imposed by city. The pedestrian/bicycle pathway condition had an essential nexus to the anticipated development because, as the city found in part.

> "the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." *Dolan v. City of Tigard, supra,* 22 Or LUBA at 622 (quoting City of Tigard Planning Commission Final Order at 20).

We are persuaded that the transportation needs of petitioners' employees and customers and the increased traffic congestion that will result from the development of petitioners' land do have an essential nexus to the development of the site, and that this condition, therefore, is reasonably related to the impact of the expansion of their business.

Because the development would involve covering a much larger portion of petitioners' land with buildings and parking, thus increasing the site's impervious area, the condition requiring petitioners to dedicate a portion of their property for improvement of a storm drainage system also is reasonably related to the impact of the expansion of their business. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. We hold that there is an essential nexus between the increased

storm water runoff caused by petitioners' development and the improvement of a drainage system to accommodate that runoff.

We agree with LUBA's conclusion that the challenged condition requiring dedication of portions of petitioners' property is not an unconstitutional taking of petitioners' property in violation of the Fifth Amendment.

The decision of the Court of Appeals and the order of the Land Use Board of Appeals are affirmed.

PETERSON, J., dissenting.

Petitioners own a commercial building in the business district of Tigard. They sought permission to replace an existing building with a larger building. The City of Tigard imposed two conditions to the granting of a building permit: one was that petitioners convey a 15-foot easement adjacent to the east bank of Fanno Creek for "storm water management and greenway purposes"; the other was that petitioners convey an 8-foot easement for a pedestrian/bicycle pathway. Petitioners appealed, asserting a violation of the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment provides in part that "private property [shall not] be taken for public use, without just compensation." This case principally involves questions of federal law. The majority states the issue as follows:

> "The issue is whether city has demonstrated the required relationship between the conditions that it attached to its approval of petitioners' proposed land use and the expected impacts of that land use." 317 Or at 112.

Development exactions such as those involved in the present case are not unusual. Over the years, a body of law has developed that permits governments, acting under their police power, to accomplish some things that also could be accomplished under their eminent domain powers. Roberts, *Mining with Mr. Justice Holmes*, 39 Vand L Rev 287 (1986).[1] Local governments, in the exercise of their federal police power and without payment of compensation, have been authorized to require developers to grant easements, make payments, or give up rights as a condition to the development of their property.

The federal rule that applies to such exactions has two facets. First, the exaction must serve a legitimate state purpose. Second, the exaction must be reasonably necessary to address problems, conditions, or burdens created by the underlying change of use of the landowner's property. *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 667 (1987). The second facet requires a showing that the development created a need for the exaction. If a recited need for an exaction is only an excuse for what actually is a taking, the exaction is invalid.

As does the majority, I place the burden of proving these two elements on the government that exacts the conditions. In establishing that the need for the exactions arises from an increased intensity of use, the government

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[1] A note in the Boston University Law Review contains an excellent historical overview of exactions. *See* Note, " *'Take' My Beach Please!*": Nollan v. California Coastal Commission *and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 BUL Rev 823, 848-49 (1989).

must show more than a theoretical nexus. It must show that the granting of the permit probably will create specific problems, burdens, or conditions that theretofore did not exist, and that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise from the granting of the permit. More than general statements of concern about increased traffic or public safety are required to support, as permissible regulation, what otherwise would be taking. The *Nollan* opinion states:

> "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a *'substantial* advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." 483 US at 841.

Here, Tigard had two possible ways to obtain the easements. The first, and less desirable from the city's view, was to condemn the easements. That would require payment of compensation under either the state or

federal constitution.[2] A second possible way to obtain the easements is by making the granting of them a condition to the granting of a permit.

I am satisfied that the city has met the first test, that the exactions serve a legitimate state purpose. The pivotal issue is whether the second requirement – that the need for the exactions arises from increased intensity of use – has been established. For the answer to this question, the court should look at the city's order to determine whether its findings of fact demonstrate a need for the exactions ordered by the city.[3]

The city's order makes repeated references to other city ordinances that contemplate the creation of a floodplain greenway and a pedestrian/bicycle pathway. The order suggests that such exactions were to be attached to *all* requests for improvements. For example:

> "Code Section 18.86.040 contains interim standards which are to be addressed for new developments in the CBD-AA zone. These requirements are intended to provide for projected transportation and public facility needs of the area. *The City may attach conditions to any*

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[2] Article I, section 18, of the Oregon Constitution, provides in part:

> "Private property shall not be taken for public use * * * without just compensation * * *."

In this court, petitioners make no claim under the Oregon Constitution.

[3] Petitioners do not contest the sufficiency of the evidence to support the findings of fact.

development within an action area prior to adoption of the design plan to achieve the following objectives:

" * * * * *

"b. The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designed bike paths or adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:

"i. Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bike paths identified in the comprehensive plan. * * *

" * * * * *

"A bicycle/pedestrian path is called for in this general location in the City of Tigard's parks Master Plans (Murase and Associates, 1988) and the Tigard Area Comprehensive Pedestrian/Bicycle Pathway Plan 1974). In addition, Community Development Code Section 18.120.180.A.8 requires that *where landfill and/or development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/bicycle plan*. The proposed development site includes land within the 100 year floodplain of Fanno Creek.

" * * * * *

"It is imperative that a continuous pathway be developed in order for the paths to function as an efficient, convenient, and safe system. Omitting a planned for section of the pathway system, as the variance would result in if approved, would conflict with Plan purposes and result in an incomplete system that would not be efficient, convenient, or safe. The requested variance therefore would conflict with the City's adopted policy of providing a continuous pathway system intended to serve the general public good and therefore fails to satisfy the first variance approval criterion.

" * * * * *

"As noted above, approval of the variance request would have an adverse effect on the existing partially completed pathway system because a system cannot fully function with missing pieces. if this planned for section is omitted from the pathway system, the system in this area will be much less convenient and efficient. If the pedestrian and bicycle traffic is forced onto City streets at this point in the pathway system because of this missing section, pedestrian and bicycle safety will be lessened. * * *

" * * * * *

"Code Section 18.120.180.A.8 requires that *where landfill and/or development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/bicycle plan.* * * *

" * * * * *

" * * * As already noted, the code at Section 18.120.080.A.8 and many other related sections (e.g., Section 18.84.040.A.7) require dedication of floodplain areas, not only for construction of pathways, but primarily to allow for public management of the storm water drainage system. * * *

" * * * *In order to accomplish these public improvements related to increasing the flow efficiency of Fanno Creek, dedication of the area of the subject site within the 100-year floodplain and also the adjacent five feet is imperative.* Not requiring dedication of this area as a condition of development approval, as the applicant's variance proposal requests, would clearly conflict with purposes and policies of the Comprehensive Plan, Community Development Code, and the City's *Master Drainage Plan.*" City of Tigard Planning Commission Final Order No. 91-09PC, pp 9-22 (1991) (emphasis added).

The quoted sections show the resolve of the city to get the easements and the purpose for the easements. However, the quoted sections of the order in no way establish that the easements necessarily are needed because of increased intensity of use of petitioners' (or anyone else's) property. Unquestionably, omission of the easements from any of the planned floodwater or pathway developments would "result in an incomplete system." But that is beside the point. If all that need be shown is that easements are needed for a legitimate public purpose, the constitutional protection evaporates. The critical question before us is whether the order shows an increased intensity of such magnitude that it creates the need for the exaction of the easements.

The following findings specifically relate to increased intensity of use in connection with the pedestrian/bicycle pathway easement:

> "[T]he Commission finds that the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed." *Id.* at 13.

Whether the first sentence of the quoted material is viewed as a legal conclusion or a finding of ultimate fact, it must be supported by findings of fact. Supporting findings are lacking. The sentence beginning with "It is reasonable to assume" is speculation, not a finding. Moreover, it states the obvious. If a pathway were built, of course customers and employees "could utilize [the pathway] for their transportation and recreational needs." Concerning the third sentence, the fact that the plans contain a reference to a bicycle rack does not establish increased intensity of use (particularly because other city ordinances require, as was required in this case, provision for bicycle parking in the plans).

The city did make some specific findings relevant to the pedestrian/bicycle pathway:

> "In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." *Ibid.*

The real issue is whether the findings that a larger building is being constructed and the two sentences of the quoted findings are sufficient to support the pathway exaction. I maintain that if the city is going to, in effect, take a portion of one's property incident to an application for a permit to develop the property, the findings of need arising from increased intensity of use must be more direct and more substantial than those. The findings of fact that the bicycle pathway system "*could* offset some of the traffic demand" is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand. (Emphasis added.) In essence, the only factual findings that support the pedestrian/bicycle pathway exaction are these: A larger commercial building is to be constructed and, as a result, there is anticipated to be "additional vehicular traffic." That is not enough to support what amounts to a virtual taking of petitioners' land. I would require findings that *demonstrate* that the increased intensity of use requires the exaction. These findings do not establish that the pathway exaction is needed because of any higher intensity of use.

I turn to the flood control and greenway easement. The factual conclusion asserted to support this exaction reads as follows:

> "The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would ad to the need for public management of the Fanno Creek floodplain, the Commission finds that the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." *Id.* at 21.

Those findings do not establish such an increased intensity of use as to require the exaction of the flood control and greenway easement. All that these findings establish is that there will be some increase in the amount of storm water runoff from the site. A thimbleful? The constitution requires more than that.

Jurisprudence lags behind the times. It is its nature to react, rather than to act. Today, forces of change are at work that challenge traditional "takings" law, forces that jurisprudence has not yet had time to accommodate. Those forces coalesce into a single phenomenon: increasing interdependence among us. There are more of us, we

live closer together, and we are increasingly interconnected. That phenomenon is not going to change except, perhaps, to accelerate.

With respect to "takings" jurisprudence, two essentially opposing tendencies emerge. The first is a tendency to recognize the legitimacy of attempts by state and local governments to regulate private property in ways that once might have been unthinkable. No person has the same range of possible uses for real property that he or she once may have had, because many uses that once were possible now may be forbidden because of their palpable impact on others. In truth, by regulation, governments regularly and permissibly take private property for public use without compensation.[4]

The second tendency – to some extent an outgrowth of the first – is that state and local governments attempt to further particular goals by placing limitations on uses of private property that only will be lifted if the property owners "dedicate" some portion of their property to the

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[4] "For a long time, there has been no Just Compensation Clause in constitutional law. Three words, 'for public use,' have been cut away from it, treated as if they prescribed a distinct command of their own. Instead of the Just Compensation Clause as written, we have a *Takings Clause* engulfed in confusion and a *Public Use Clause* of nearly complete insignificance.

"This strange breach is never remarked on. It is simply presupposed, most clearly, by those who complain about the toothlessness of the 'Public Use Clause' in modern doctrine. Their complaint is an old story: it has to do with the line of Supreme Court decisions in which the public-purpose requirement received its current, broad construction." Rubenfeld, *Usings*, 102 Yale LJ 1077, 1078-79 (1993) (footnotes omitted; emphasis in original).

particular government program. The temptation, particularly in times of limited tax revenues, is to place the primary burden for funding projects on the shoulders of those whose private property happens to be in the neighborhood of the proposed projects, whether or not the projects bear any relationship to the property or to the uses to which the property is put.

The first of these tendencies seems benign and, even if it were otherwise, it would be inevitable. Some private property rights are going to have to bend, if our increasingly interdependent society is to continue to evolve and progress peacefully. The second tendency is an attempt at licensed extortion. The trouble is, what once would have been recognizable as extortion may turn, in time, into something considered benign because it is so familiar. That transmogrification is encouraged every time a court cannot distinguish whether a particular governmental regulation falls within the ambit of the second tendency, rather than the first.

In cases involving exactions attached to permits, hearings are held, evidence is taken, and findings are made, and the government must show why the development spawns the need for exaction. The findings relating to the need for exactions arising from future increased intensity of use after the property is developed must establish more than a *potential* increase in intensity; they must establish more than *some* increase in intensity; they must establish a bona fide need for the extraction that arises from the development.

Because this case turns on federal law, the majority and I rely on the same federal precedents. Why, then, do

we arrive at different results? Under current federal law, if a local government follows the procedures mandated by federal law, it can, incident to the regulation of use of land, take large part of the owner's ownership rights, so long as there remains *some* economically feasible private use. *Lucas v. So. Carolina Coastal Council*, 505 U.S. ___, 112 S Ct 2886, 120 L Ed 2d 798, 815 n 8 (1992). As the *Lucas* opinion itself states, landowners who lose 95 percent of the beneficial use of their property are entitled to no compensation, whereas landowners who lose all beneficial use fully are compensated. *Ibid.*

That power of the government gives it tremendous leverage against landowners who seek to improve their property. Because of the profound potential adverse effects that the substantive rule places on landowners, I read the federal precedents to require a high threshold that the government must meet in showing that the exaction is needed because of intensified land use by the landowner. It is not enough for a government to read the latest pertinent decision of the Supreme Court of the United States and insert in its order "magic words" from the decision (such as "the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site"). If in the fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely *why* the need in fact exists is a modest burden to place on the government. Such precision is lacking in this order.

From reading the order in this case, I am convinced that Tigard decided that it needed a pedestrian/bicycle pathway and a flood control greenway easement along

Fanno Creek. One way of getting these, free of cost, is by requiring all owners who propose to change the use of their property to convey the easements to the city. That is what happened in this case.

The findings here do not establish any cognizable remediable purpose attributable to the change in use. The conditions relating to the pedestrian/bicycle pathway and flood control and greenway easements are impermissible on the record made in this case. I therefore dissent.

APPENDIX B

APPELLATE JUDGMENT

FILED: July 1, 1993

IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN T. DOLAN and FLORENCE DOLAN,

Petitioners on Review,

v.

CITY OF TIGARD,

Respondent on Review.

(LUBA 91-161; CA A73769; SC S39393)

In Banc

On review from the Court of Appeals.*

David B. Smith, Tigard, attorney for petitioners on review.

James M. Coleman, Portland, attorney for respondent on review.

Daniel J. Popeo and Paul D. Kamenar, Washington, D.C., and Gregory S. Hathaway, Portland, filed a brief *amicus curiae* for Washington Legal Foundation.

Timothy J. Sercombe and Edward J. Sullivan, Portland, filed a brief *amicus curiae* for 1000 Friends of Oregon.

Ronald A. Zumbrun and Robin L. Rivett, Sacramento, California, and Richard M. Stephens, Bellevue, Washington, filed a brief *amicus curiae* for Pacific Legal Foundation.

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* Judicial review from Land Use Board of Appeals, 22 LUBA 617 (1992). 113 or App. 162, 832 P2d 853 (1992).

VAN HOOMISSEN, J.

The decision of the Court of Appeals and the order of the Land Use Board of Appeals are affirmed.

Peterson, J., dissented and filed an opinion.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent on review

[ ] No costs allowed.

[X] Costs allowed, payable by: Petitioners on review

MONEY JUDGMENT
Judgment #1

Creditor: CITY OF TIGARD

Debtor: JOHN T. DOLAN and FLORENCE DOLAN

Costs:	$160.00*	*$60.00 of this amount to be paid to:
Attorney Fees:	-0-	STATE COURT ADMINISTRATOR
TOTAL:	$160.00	

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment Effective Date: July 28, 1993

SUPREME COURT (seal)

APPENDIX C

Argued and submitted April 13, affirmed May 20, reconsideration denied July 29, petition for review allowed October 27, 1992 (314 Or 573)
See later issue Oregon Reports

John T. DOLAN
and Florence Dolan,
Petitioners,

v.

CITY OF TIGARD,
Respondent.
(LUBA 91-161; CA A73769)

832 P2d 853

Developers petitioned for judicial review of decision of the Land Use Board of Appeals affirming conditions on development. The Court of Appeals, Richardson, P.J., held that there was direct and reasonable relationship between conditions that city attached to its approval of intensified use and impacts and public needs to which use would give rise.

Affirmed.

1. EMINENT DOMAIN – Nature, extent, and delegation of power – what constitutes a taking; police and other powers distinguished – Relating to zoning, planning, or land use

In determining whether condition on development constitutes a taking, court inquires whether there is legitimate governmental interest that regulation establishing the condition is designed to serve, whether regulation and condition substantially advance that interest, and

whether there is reasonable relationship between impacts or public needs that result from development and conditions that may be attached to its approval to ameliorate or respond to those impacts and needs. US Const. Amend V; Or Const, Art I, § 18.

2. Eminent domain – Nature, extent, and delegation of power – What constitutes a taking; police and other powers distinguished – Relating to zoning, planning, or land use – zoning and planning – Permits, certificates and approvals – Streets, improvements, and utilities

Conditions attached by city on its approval of intensified commercial use of property, of dedicating part of property for pedestrian and bicycle pathway and for greenway and storm water drainage purposes did not constitute a taking; there was direct and reasonable relationship between conditions and impacts and public needs to which use would give rise.

Judicial Review from Land Use Board of Appeals.

David B. Smith, Tigard, argued the cause and filed the brief for petitioners.

James M. Coleman, Portland, argued the cause for respondent. With him on the brief was O'Donnell, Ramis, Crew & Corrigan, Portland.

Before Richardson, Presiding Judge, and Deits and Durham, Judges.

RICHARDSON, P.J.

Affirmed.

CJS, Zoning and Land Planning § 197.

RICHARDSON, P.J.

Petitioners applied to the City of Tigard for a permit to tear down the existing retail building on their property, to construct a larger one and to intensify the commercial use of the property. The city granted the application, subject to the conditions specified in applicable zoning ordinance provisions that petitioners dedicate part of the property for a pedestrian and bicycle pathway and for greenway and storm water drainage purposes. Subsequently, petitioners sought a variance from the provisions prescribing the conditions, which the city denied. Petitioners appealed to LUBA, contending that the dedication requirements constitute uncompensated takings of the property in violation of Article I, section 18, of the Oregon Constitution and the Fifth Amendment to the federal constitution, made applicable to the city by the Fourteenth Amendment. LUBA rejected the contentions and affirmed the city's decision. Petitioners seek review, and we affirm.

1. In *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), the Supreme Court developed what appears to be a three-level inquiry for determining when a condition on development constitutes a taking. The first question is whether there is a legitimate governmental interest that the regulation that establishes the conditions is designed to serve. The second is whether the regulation and the condition "substantially advance" that interest. *See Agins v. Tiburon*, 447 US 255, 100 S Ct 2138, 65 L Ed 2d 106 (1980). In *Dept. of Trans. v. Lundberg*, 312 Or 568, 576-77, 825 P2d 641 (1992), the Oregon Supreme Court explained the second part of the *Nollan* inquiry:

"The Supreme Court of the United States held that this type of condition amounts to an unconstitutional taking unless there is an 'essential nexus' between the land use regulation that the permit condition is intended to implement and the permit condition. The Court described this requirement:

> " '[A] permit condition that serves the same legitimate [governmental] purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. * * *
>
> " 'The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. * * * In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion." '

"Nollan v. California Coastal Comm'n, supra, 483 US at 836-37 (citing authority). The Court concluded that the permit condition did not serve any of the purposes relied on to justify its imposition. The lack of nexus between the permit condition and the purpose of the building restriction converted that purpose to 'the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation[,]' *i.e.*, to an unconstitutional taking. *Id.* at 837." (Brackets in original.)

The third inquiry is concerned with the application of the conditions to particular developments and poses the question of what relationship must exist between the impacts or public needs that result from a development and the conditions that may be attached to its approval to ameliorate or respond to those impacts and needs. (In land use parlance, this is sometimes called the relationship between "impacts" and "exactions.") The Court said in *Nollan:*

> "The Commission claims * * * that we may sustain the condition at issue here by finding that *it is reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes. We can accept, for purposes of discussion, the Commission's proposed test* as to how close a 'fit' between the condition and the burden is required, because we find that this case [*sic*] does not meet even the most untailored standards." 483 US at 838. (Emphasis supplied.)

The Court proceeded to hold that requiring the Nollans to grant a public beach access easement did not have the necessary relationship to the construction of the house for which they sought a permit. Stripped to its essentials, the Court's reasoning is that the house would not interfere with access in the way that the Commission thought and, therefore, the easement could not be required to promote access, at least without payment of compensation to the Nollans.

Although petitioners' brief in this court differs significantly from the argument that they made to LUBA, the principal issues here, as there, are what the proper test is

for ascertaining whether a condition survives constitutional scrutiny under the third question in *Nollan* and whether the conditions here pass that test. The city argues, and LUBA concluded, that the "reasonable relationship" test is the correct one under both constitutions. LUBA explained the substance of that test:

> "The 'reasonable relationship' standard is somewhere between the more extreme standards followed by courts in a few jurisdictions which require that the need for a development exaction be 'specifically and uniquely attributable' to the proposed development, or that a development exaction merely have 'some relationship' to the proposed development. *Parks v. Watson*, [716 F2d 646 (9th Cir 1983)]."

Petitioners do not appear to dispute that that is the correct conclusion under the Oregon Constitution, and we agree with LUBA's conclusion and its analysis of the Article I, section 18, issue. *See Hayes v. City of Albany*, 7 Or App 277, 490 P2d 1018 (1971); *O'Keefe v. City of West Linn*, 14 Or LUBA 284 (1986). The reasonable relationship test has also been adopted as the correct standard under the Fifth Amendment by most courts that have addressed the question. It was endorsed by the Ninth Circuit in *Parks v. Watson, supra*, and that court in effect held in *Commercial Builders v. Sacramento*, 941 F2d 872 (9th Cir 1991), that *Nollan* did nothing to change or modify the applicable test. *See* note 1, *infra*.

Petitioners argue that *Commercial Builders* is incorrect and that *Nollan* demands a more stringent Fifth Amendment standard. They maintain that *Nollan* requires a "substantial relationship" or "essential nexus" between

developmental impacts and conditions if the conditions are not to constitute takings. It is unclear how petitioners think that the various tests might differ in practice. It is clear, however, that they misread *Nollan*. The language to which they trace the putatively heightened test appears in the Court's reiteration that the regulation must substantially advance the legitimate state interest that it is meant to serve and in its explanation that a condition that is substituted for a prohibition must further the end that justifies the prohibition. 483 US at 834, 837; *see Agins v. Tiburon, supra*. In other words, that language relates to the second of *Nollan's* questions, but the third question is the one presented here. The language in *Nollan* that is most in point, and is quoted above, assumes *arguendo* the correctness of the reasonable relationship standard for determining the permissibility of imposing conditions responsive to the impacts of particular developments. In the light of the Ninth Circuit's and LUBA's well-reasoned espousals of the reasonable relationship standard, and in the absence of anything approaching a rejection of it in *Nollan*, we conclude that it is the proper test under the Fifth Amendment as well as under Article I, section 18.[1]

2. The city stated in findings that petitioners do not challenge:

> "[T]he dedication and pathway construction are reasonably related to the applicant's request to

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[1] Aside from the test that petitioners argue was adopted in *Nollan*, and which we have held was not adopted there, the United States Supreme Court has not adopted the reasonable relationship test or any other, so far as we, LUBA or the parties know.

intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreation needs. * * * In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

"[T]he required [greenway and storm water drainage] dedication [is] reasonably related to the applicant's request to intensify the usage of this site, thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, * * * the requirement of dedication of the floodplain area on the site is related to the

applicant's plan to intensify development of the site."

LUBA concluded, and we agree, that those findings demonstrate a direct and reasonable relationship between the conditions that the city attached to its approval of the intensified use and the impacts and public needs to which the use will give rise. In addition to the fact that the conditions are part of a general and comprehensive regulatory scheme, the findings demonstrate that the increased water runoff from the intensified development will create conditions to which the greenway/storm water drainage requirement is responsive. Similarly, the pedestrian and bicycle pathway condition is reasonably calculated to alleviate the increased traffic problems and accommodate the increased need and demand for non-vehicular access to the area that will result from the intensified operations. The conditions satisfy the reasonable relationship standard. *See Dept. of Trans. v. Lundberg, supra.*

Petitioners also argue that the deprivation of their possession and use of the dedicated part of their property is a "*per se* taking" that violates both constitutions, even if it survives the constitutional standards for the imposition of conditions on development approvals. The argument is circular. If the standards articulated for the imposition of conditions in *Nollan* and other apposite authorities are satisfied, there is, *per se*, no unconstitutional taking, because the only way in which petitioners do or can assert that the city took their property was by imposing the conditions.

Petitioners attempt to extricate themselves from that truism by contending that the "invasion" of their property affects the parcel as a whole, even though the dedication requirement applies to far less than the whole. They also argue that the conditions deny them all economically viable use of their land. Both assertions are untenable.

Affirmed.

APPENDIX D

JOHN T. DOLAN and FLORENCE DOLAN,
Petitioners,

vs.

CITY OF TIGARD,
Respondent.

~~LUBA NO. 91-161~~

Appeal from City of Tigard.

Joseph R. Mendez, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Knappenberger & Mendez.

James M. Coleman, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was O'Donnell, Ramis, Crew & Corrigan.

David B. Smith, Tigard, filed a brief and argued on behalf of amicus Oregonians in Action.

SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON, Referee, participated in the decision.

AFFIRMED 02/07/92.

1. **Constitutional Law – Oregon Constitution – Non-procedural Issues.**

Article I, Section 18, of the Oregon Constitution requires that there be a "reasonable relationship" between a condition of approval and the impacts of or needs generated by the proposed development.

2. **Constitutional Law – U.S. Constitution – Non-procedural Issues.**

A condition requiring dedication of portions of the applicants' property is not an unconstitutional taking under the Fifth Amendment of the U.S. Constitution, if it

has a "reasonable relationship" to the impacts of the proposed development. *Nollan v. California Coastal Com'n*, 483 US 825, 107 S Ct 3141, 97 L Ed2d 677 (1987), does not establish a new, stricter standard for the relationship required between the impacts of a proposed development and exactions imposed as conditions of approval.

3. **Constitutional Law – Oregon Constitution – Non-procedural Issues.**

   Constitutional Law – U.S. Constitution – Non-procedural Issues.

Where a proposed larger building and paved parking area will increase the amount of impervious surfaces on the subject property and, therefore, runoff into an adjacent creek, there is a "reasonable relationship" between the proposed development and a condition requiring land along the creek to be dedicated for a planned greenway for management of storm water runoff.

4. **Constitutional Law – Oregon Constitution – Non-procedural Issues.**

   Constitutional Law – U.S. Constitution – Non-procedural Issues.

Where a significantly larger retail sales building and parking lot will accommodate larger numbers of customers and employees and their vehicles, there is a reasonable relationship between alleviating these impacts of the development and a condition requiring dedication of land for a pedestrian/bicycle pathway as an alternative means of transportation.

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a city council resolution granting site development review approval for construction of a retail sales building, but denying variances to Tigard Community Development Code (TCDC) provisions requiring dedication of land for a greenway and a pedestrian/bicycle pathway and prohibiting roof signs.[1]

FACTS

Petitioners appealed a previous city decision granting site development review approval for construction of the proposed retail sales building, and imposing conditions requiring greenway and pedestrian/bicycle pathway dedications and roof sign removal. In our opinion in that appeal, *Dolan v. City of Tigard*, 20 Or LUBA 411, 412 (1991) (*Dolan I*), we set out the following relevant facts:

> "Petitioners own a 1.67 acre parcel in downtown Tigard which is designated Central Business District on the Tigard Comprehensive Plan (plan) map and is zoned Central Business District – Action Area (CBD-AA). A 9,700 square foot retail sales building, occupied by an electric and plumbing supply business also owned by petitioners, is located on the eastern edge of the subject parcel. The structure includes a large roof sign, and is adjoined by a partially paved

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[1] The challenged decision also approves a variance to applicable TCDC parking requirements for general retail sale businesses, allowing provision of only 39, rather than 44, parking spaces. However, this portion of the decision is not at issue in this appeal.

parking lot. Fanno Creek flows through the southwestern corner of the subject parcel and along its western boundary.

"Petitioners applied to the city for site development review approval to replace the existing building with a 17,600 square foot retail sales building constructed on the western portion of the subject parcel.† * * * "

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†"Petitioners proposed to demolish the existing 9,700 square foot building after the new building was completed and the electric and plumbing supply business moved into it."

In *Dolan I*, we affirmed the challenged city decision. Specifically, we held petitioners' claims that the conditions of approval requiring dedication of portions of their property for a greenway and a pedestrian/bicycle pathway constituted an unconstitutional "taking" under both the United States and Oregon Constitutions were not "ripe" for review, because petitioners had not sought relief through the variance process provided by TCDC Chapter 18.134. *Id.*, 20 Or LUBA at 425-26. We also rejected petitioners' claim that the condition requiring removal of the existing roof sign within 45 days of the issuance of an occupancy permit for the new building was unreasonable and a "denial of due process," because petitioners did not support this constitutional claim with legal argument. *Id.*, 20 Or LUBA at 426.

On March 28, 1991, petitioners submitted a new site development review application for the proposed retail sales building to the city, including requests for variances

from TCDC 18.120.180.A.8,[2] 18.86.040.A.1.b[3] and 18.114.070.H.[4] On September 17, 1991, the city council

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[2] TCDC 18.120.180.A.8 establishes the following standard for site development review approval:

"Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan."

[3] TCDC 18.86.040.A.1 provides in relevant part:

"The City may attach conditions to any development within an action area prior to adoption of the design plan to achieve the following objectives:

"* * * * *

"b. The development shall facilitate pedestrian/bicycle circulation if the site is located * * * adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:

"(i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. * * *

"* * * * *"

[4] TCDC 18.114.070.H prohibits "roof signs of any kind." There is confusion in the record as to whether petitioners really sought a variance to this provision, or rather sought to convince the city that the sign in question is not actually a "roof sign." *See* Record 9, 27, 160.

adopted the challenged resolution approving site development review, but denying the requested variances. The city's decision includes the following relevant conditions:

> "1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (*i.e.* all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area. * * * "[5] Record 31-32.
>
> "15. The existing roof sign shall be permanently removed from the subject property within 45 days of the issuance of the Occupancy Permit for the new building."[6] Record 34.

FIRST ASSIGNMENT OF ERROR

> "The City's decision to demand the dedication to the City of those portions of Petitioners' land lying 15 feet to the east of the 100-year flood plain boundary constitutes an unlawful taking in violation of Petitioners' rights under the Oregon and United States Constitutions."

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[5] The dedications required by this condition comprise approximately 7,000 square feet, or 10% of the subject parcel. Record 159.

[6] Conditions 1 and 15 are virtually identical to conditions included in the site design review approval decision challenged in *Dolan I*. *See Dolan I*, 20 Or LUBA at 413.

SECOND ASSIGNMENT OF ERROR

> "The City Council's exaction of all portions of Petitioners' property falling within the 100-year flood plain constitutes an unlawful taking of private property for public use, in violation of the Oregon and United States Constitutions."[7]

A. Introduction

In the first and second assignments of error, petitioners challenge the validity of the condition imposed by the city requiring petitioners to dedicate to the city the portions of the subject parcel within the 100-year flood plain of Fanno Creek and within 15 feet to the east of the flood plain boundary. Petitioners argue that this condition of site development review approval constitutes a taking, without just compensation, of the 7,000 square feet of their parcel required to be dedicated for public use, in violation of the Fifth Amendment to the United States Constitution and Article I, Section 18 of the Oregon Constitution. Petitioners ask that we either reverse the city's imposition of this condition or remand the decision to the city with instructions to remove the condition.

Petitioners do not contend that establishing a greenway in the floodplain of Fanno Creek for

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[7] The brief of amicus Oregonians in Action includes an assignment of error which states essentially the same allegations as petitioners' first and second assignments of error. The purpose of amicus participation is to aid this Board in its review of relevant issues. OAR 661-10-052(1). We consider amicus' arguments to the extent they are relevant to the issues raised by petitioners' assignments of error.

storm water management purposes, and providing a pedestrian/bicycle pathway system as an alternative means of transportation, are not legitimate public purposes. Further, petitioners do not challenge the sufficiency of the "nexus" between these *legitimate public purposes* and the *condition* imposed requiring dedication of portions of petitioners' property for the greenway and pedestrian/bicycle pathway. Rather, petitioners' contention is that under both the federal and Oregon Constitutions, the relationships between the *impacts* of the proposed development and the *exactions* imposed are insufficient to justify requiring dedication of petitioners' property without compensation.

The challenged decision includes the following findings addressing the impacts of the proposed development and the relationship between the impacts of the proposed development, and the required dedication of land for greenway and pedestrian/bicycle pathway purposes:

"The * * * requirements for dedication of the area adjacent to the floodplain for greenway purposes and for construction of a pedestrian/bicycle pathway [do not] constitute a taking of the applicant's property. [T]he dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and

recreation needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." Record 20.

"The * * * requirements for dedication of the area within the floodplain of Fanno Creek for storm water management and greenway purposes [do not constitute] a taking of the applicant's property. [T]he required dedication [is] reasonably related to the applicant's request to intensify the usage of this site, thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage

> would add to the need for public management of the Fanno Creek floodplain, * * * the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." Record 28.

Petitioners generally argue under these assignments of error that the proposed development is "in no way related to" or "not related to" the challenged dedication requirement. Petition for Review 11, 14. However, petitioners do not challenge the adequacy of the above quoted findings or their evidentiary support in the record. Therefore, for purposes of evaluating petitioners' constitutional taking claims, we assume that the facts found by the city concerning the impacts of the proposed development and the need for storm water management and alternative means of transportation are valid, and consider only whether these facts are legally sufficient to establish the requisite relationship between the impacts of the proposed development and the exaction imposed.

B. Oregon Taking Claim

Article 1, Section 18 of the Oregon Constitution provides in relevant part:

> "Private property shall not be taken for public use * * * without just compensation * * * ."

Petitioners contend the Oregon Supreme Court has never articulated a standard for applying Article I, Section 18 of the Oregon Constitution to conditions of development approval which constitute a physical taking, such as a condition requiring dedication of land. Petitioners argue, however, that we should apply the "reasonable

relationship" standard previously used by the Court of Appeals and this Board in other contexts to determine the validity of development exactions. *Hayes v. City of Albany*, 7 Or App 277, 285, 490 P2d 1018 (1971); *O'Keefe v. City of West Linn*, 14 Or LUBA 284, 293 (1986). Petitioners contend there is no "reasonable relationship" between the disputed condition requiring dedication of a portion of their property for a greenway and a pedestrian/bicycle pathway and the impacts of the proposed development.

1 We agree with petitioners that Article I, Section 18, of the Oregon Constitution requires that there be a "reasonable relationship" between the challenged condition and the impacts of or needs generated by the proposed development. For the reasons stated in the following subsection of this opinion, we find such a "reasonable relationship" exists.

This subassignment of error is denied.

C. Federal Taking Claim

The Fifth Amendment to the United States Constitution, made applicable to states and local governments through the Due Process Clause of the Fourteenth Amendment, provides in relevant part:

> "[N]or shall private property be taken for public use, without just compensation."

Both petitioners' and amicus' arguments rely heavily on the opinion of the United States Supreme Court in *Nollan v. California Coastal Com'n*, 483 US 825, 107 S Ct 3141, 97 L Ed2d 677 (1987) (*Nollan*). Prior to *Nollan*, it had been established by most court, including the federal

courts of this circuit, that a development exaction must have a "reasonable relationship" to the impacts of, or needs created by, the proposed development.[8] *See e.g., Parks v. Watson*, 716 F2d 646, 653 (9th Cir 1983). Petitioners and amicus argue that under *Nollan*, something more than a "reasonable relationship" between the impacts of the proposed development and the required exaction is necessary to avoid an unconstitutional taking. Petitioners and amicus variously describe the closer relationship required as a "clear match," and "essential nexus" or a "substantial relationship." Petition for Review 11; Amicus Brief 9, 11. Petitioners and amicus further argue that the dedication required by the challenged condition is clearly intended to secure benefits for the general public and is not even reasonably related to any hypothetical impacts on storm water drainage and traffic due to the proposed development.

Respondent contends *Nollan* does not require that there be a closer relationship between the *impacts* of a proposed development and the extent of exactions imposed. According to respondent, the closer relationship required by *Nollan* is that there be an "essential nexus" between the *legitimate public purpose* pursued and the

[8] The "reasonable relationship" standard is somewhere between the more extreme standards followed by courts in a few jurisdictions which require that the need for a development exaction be "specifically and uniquely attributable" to the proposed development, or that a development exaction merely have "some relationship" to the proposed development. *Parks v. Watson, supra.*

nature of the exaction imposed as a condition of development approval. Respondent also argues that in *Commercial Builders v. Sacramento*, 941 F2d 872 (9th Cir 1991), the court considered the impact of *Nollan* with regard to this issue and stated:

> " * * * *Nollan* does not stand for the proposition that an exaction * * * will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, *Nollan* holds that where there is *no* evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld. * * * " (Emphasis added.) *Commercial Builders v. Sacramento, supra*, 941 F2d at 875.

Respondent contends all that is required is a "reasonable relationship" between the impacts of the proposed development and the exaction imposed by the challenged condition. With regard to the required dedication of land within the floodplain of Fanno Creek for a greenway, respondent argues that the city's adopted Master Drainage Plan indicates the Fanno Creek greenway is an essential part of the city's program for storm water management. Respondent further argues the city's undisputed findings establish that the proposed development, which includes a larger building and paved parking lot, will increase the amount of impervious surface on the site and, therefore, will increase storm water runoff from the site. According to respondent, this is sufficient to establish a "reasonable relationship" between the proposed development and the dedication required.

property is not an unconstitutional taking if it has a "reasonable relationship" to the impacts of or needs generated by the proposed development. To the extent petitioners suggest the city is required to establish a numerical relationship between the increase in runoff due to the proposed development and the amount of land dedicated for the greenway, or that the land dedicated for the greenway will not also accommodate increased upstream discharges, we disagree. In view of the comprehensive Master Drainage Plan adopted by respondent providing for use of the Fanno Creek greenway in management of storm water runoff, and the undisputed fact that the proposed larger building and paved parking area on the subject property will increase the amount of impervious surfaces and, therefore, runoff into Fanno Creek, we conclude there is a "reasonable relationship" between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway.

4 Furthermore, the city has adopted a Comprehensive Pedestrian/Bicycle Pathway Plan which provides for a continuous network of pedestrian/bicycle pathways as part of the city's plans for an adequate transportation system. The proposed pedestrian/bicycle pathway segment along the Fanno Creek greenway on the subject property is a link in that network. Petitioners propose to construct a significantly larger retail sales building and parking lot, which will accommodate larger numbers of customers and employees and their vehicles. There is a reasonable relationship between alleviating these impacts of the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation.

We, therefore, conclude the challenged condition requiring dedication of portions of petitioners' property is not an unconstitutional taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

This subassignment of error is denied.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

> "The City has characterized an existing wall sign as a 'roof sign.' By mischaracterizing the sign, the City then establishes a requirement that the sign be removed within 45 days of occupancy of the new building which is unreasonable and hence a denial of due process."

Petitioners argue the "roof sign" on the existing building which is required to be removed by condition 15 is actually "part of a parapet wall constructed on the existing building in order to join three small buildings into one structure and hide unsightly roof liens." Petition for Review 16, Petitioners also argue that the sign in question is an integral part of the existing building, and that it is unreasonable for the city to require them to remove it within 45 days of obtaining an occupancy permit for the new building.

Whether the sign in question is correctly characterized as a "roof sign" is of no importance to resolution of this assignment of error. Petitioners do not contend the challenged condition would be impermissible if the sign were other than a "roof sign." Rather, petitioners contend the condition is impermissible because the amount of

time allowed for them to remove the sign is "unreasonable and hence a denial of due process."

In response to the same argument by petitioners in *Dolan I*, we stated:

> "* * * Petitioners presumably intend this phrase to indicate that the city's decision is unconstitutional in some way and, therefore, subject to reversal or remand under ORS 197.835(7)(a)(E). However, no argument supporting an allegation of unconstitutionality is provided in the petition for review. This Board has consistently declined to consider claims of constitutional violations where, as here, they are unsupported by legal argument. *Van Sant v. Yamhill County*, 17 Or LUBA 563, 566-67 (1989); *Faulkender v. Hood River County*, 17 Or LUBA 360, 366 (1989); *Portland Oil Service Co. v. City of Beaverton*, 16 Or LUBA 255, 269 (1987); *Chemeketa Industries Corp. v. City of Salem*, 14 Or LUBA 159, 165-66 (1985)." *Dolan I*, 20 Or LUBA at 426-27.

Petitioners still do not provide any legal argument in support of their allegation of unconstitutionality with regard to the time limit for removal of the "roof sign."

The third assignment of error is denied.

The city's decision is affirmed.

APPENDIX E

JOHN T. DOLAN and FLORENCE DOLAN,
Petitioners,

vs.

CITY OF TIGARD,
Respondent.

LUBA No. 90-029

Appeal from City of Tigard.

Joseph R. Mendez and Kathryn H. Clarke, Portland, filed the petition for review and a reply brief. With them on the brief was Knappendberger & Mendez. Joseph R. Mendez argued on behalf of petitioners.

Phillip E. Grillo, Portland, filed the response brief. With him on the brief was O'Donnell, Ramis, Elliott & Crew. James M. Coleman, Lake Oswego, argued on behalf of respondent.

SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED 01/24/91

1. LUBA Procedures/Rules – Briefs – Reply.

Argument in respondent's brief that the remedy petitioners seek is unclear, or that petitioners failed to object to statutes, and citation in respondent's brief of cases which petitioners believe irrelevant are not new matters which warrant the filing of a reply brief, but rather are matters to which petitioners can adequately respond at oral argument.

2. **LUBA Procedures/Rules – Petition for Review.**

LUBA Scope of Review – Generally.

No statutory or rule provisions require a petition for review to conform with requirements for pleadings in circuit court proceedings. If a petition for review does not set out facts and legal argument sufficient to persuade LUBA that there is a basis for reversal or remand of the challenged decision, LUBA simply affirms the decision.

3. **Constitutional Law – U.S. Constitution – Non-procedural Issues.**

A federal taking claim challenging a condition of development approval is not ripe for review if a variance process in the local code is an available administrative means for petitioners to seek relief from the disputed condition.

4. **Constitutional Law – Oregon Constitution – Non-procedural Issues.**

Petitioners' challenge to a condition of development approval as a taking, contrary to the Oregon Constitution, cannot be upheld if a variance process in the local code is an available administrative means for petitioners to seek relief from the disputed condition.

5. **Constitutional Law – Nonspecific Constitutional Claims.**

LUBA will not consider claims of constitutional violations which are unsupported by legal argument.

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a Tigard City Council resolution granting, with conditions, site development review approval and a variance allowing construction of a new retail sales building and parking lot to replace a smaller existing facility.

FACTS

Petitioners own a 1.67 acre parcel in downtown Tigard which is designated Central Business District on the Tigard Comprehensive Plan (plan) map and is zoned Central Business District – Action Area (CBD-AA). A 9,700 square foot retail sales building, occupied by an electric and plumbing supply business also owned by petitioners, is located on the eastern edge of the subject parcel. The structure includes a large roof sign, and is adjoined by a partially paved parking lot. Fanno Creek flows through the southwestern corner of the subject parcel and along its western boundary.

Petitioners applied to the city for site development review approval to replace the existing building with a 17,600 square foot retail sales building constructed on the western portion of the subject parcel.[1] Petitioners also requested a variance to applicable Tigard Community Development Code (TCDC) parking requirements for

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[1] Petitioners proposed to demolish the existing 9,700 square foot building after the new building was completed and the electric and plumbing supply business moved into it.

general retail sale businesses, to allow provision of only 39, rather than 44, parking spaces.

The city planning director approved petitioners' site development review and variance application, imposing 14 conditions. The conditions included the following:

> "[Prior to the issuance of building permits t]he applicant shall dedicate to the City as greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (*i.e.* all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. * * * The building shall be designed so as not to intrude into the greenway area."[2] Record 238.
>
> "[Prior to issuance of an occupancy permit t]he existing roof sign shall be permanently removed from the subject property." Record 239.

Petitioners appealed the planning director's decision to the planning commission, challenging five of the conditions imposed by the planning director, including the two quoted above.

After a public hearing, the planning commission approved petitioners' application with 12 conditions, including the first one quoted above. However, the planning commission modified the condition requiring removal of the roof sign on the existing building to provide that it "shall be removed within 45 days of the issuance of the Occupancy Permit for the new building."

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[2] The dedications required by this condition would comprise approximately 7,000 square feet, or 10% of the subject parcel. Record 26.

Record 132. Petitioners appealed the planning commission's decision to the city council, challenging five of the conditions imposed, including the two quoted above.

After a further public hearing, the city council adopted a resolution denying the appeal and upholding the planning commission's decision.[3] This appeal followed.

MOTION TO FILE REPLY BRIEF

Pursuant to OAR 661-10-039,[4] petitioners request permission to file a reply brief addressing the following issues, which petitioners contend were raised for the first time in respondent's brief:

> "1) Petitioners have failed to exhaust administrative remedies;
>
> "2) Petitioners have failed to state a claim;
>
> "3) Petitioners are required to challenge the City's comprehensive plan and development code;
>
> "4) The remedy Petitioners seek is unclear;

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[3] The city council made a minor modification to one condition imposed by the planning commission which is not at issue in this appeal. The city council also adopted as its own the planning commission's findings of fact, analysis and conclusions. Record 28.

[4] OAR 661-10-039 provides:
"A reply brief may not be filed unless permission is first obtained from the Board. A reply brief shall be confined solely to new matters raised in the respondent's brief. * * * "

"5) Petitioners are required to object to statutes; and

"6) State and federal cases have been cited by Respondent which are not relevant and can be distinguished by Petitioners." Petitioners' Motion for Permission to File a Reply Brief 1.

Respondent objects to petitioners' motion and argues that points one through five above are not "new matters" raised for the first time in respondent's brief. Respondent argues that points one through four are simply arguments that petitioners failed to establish that all of the critical elements of a "takings" claim are satisfied. Respondent contends that point five above merely points out a weakness in petitioners' arguments in the petition for review. With regard to point six, respondent argues it is not necessary for petitioners to file a reply brief to distinguish cases cited by respondent, as that can be accomplished at oral argument.

We have interpreted OAR 661-10-039 "to require petitioners to demonstrate a need for a reply brief." *Knapp v. City of Jacksonville*, 20 Or LUBA 189, 194 (1990); *Kellogg Lake Friends v. Clackamas County*, 17 Or LUBA 277, 281 (1988), *aff'd* 96 Or App 536, *rev den* 308 Or 197 (1989). We agree with petitioners that respondent's claim that petitioners failed to exhaust administrative remedies (point one above) was raised for the first time in respondent's brief, and warrants the filing of a reply brief.

1 However, with regard to points two and three above, these points were raised not only in respondent's brief, but also in respondent's Motion to Dismiss for Failure to State a Claim, filed the same day as respondent's brief.

Petitioners addressed these points in their Memorandum in Response to Motion to Dismiss for Failure to State a Claim. Petitioners do not need an *additional* opportunity to respond to these points in a reply brief. Finally, points four through six above are not really new matters, but rather the type of argument in a response brief to which petitioners can adequately respond at oral argument.

Accordingly, petitioners' motion to file a reply brief is granted with regard to the issue of whether petitioners failed to exhaust administrative remedies, and is otherwise denied.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Respondent moves for issuance of an order dismissing this appeal on the grounds that petitioner has failed to state a claim upon which relief can be granted. Respondent argues that under their first and second assignments of error, petitioners allege that the appealed decision is an unconstitutional "taking" of private property for public use without just compensation, in violation of the Fifth Amendment of the U.S. Constitution and Article 1, Section 18 of the Oregon Constitution. Respondent contends that petitioners fail to allege in their petition for review facts which, under state and federal law, are required elements of a takings claim.[5]

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[5] For instance, respondent complains that the petition for review fails to allege that the city's decision "destroys a major portion of the property's value" and "depriv[es the owners] of the property's economically valuable use," and fails to set out facts establishing the value of the property, the value of the

Petitioners maintain that a petition for review in a LUBA appeal is not a pleading like a complaint in a circuit court proceeding. Petitioners argue that no statute or administrative rule requires a petition for review to contain allegations of ultimate facts sufficient to constitute a claim for relief.

2 ORS 197.830(11) requires a petition for review to include:

> "(a) The facts that establish that the petitioner has standing;
>
> "(b) The date of the [appealed] decision;
>
> "(c) The issues the petitioner seeks to have reviewed."

ORS 197.835(1) requires LUBA to review the issues raised in a petition for review and issue a final order affirming, reversing or remanding the challenged land use decision. ORS 197.350(1) provides that a party appealing a land use decision to LUBA has the burden of persuasion. We agree with petitioners that there are no statutory or rule provisions which require a petition for review to conform with requirements for pleadings in circuit court proceedings. If a petition for review does not set out facts and legal argument sufficient to persuade us that there is a basis for reversal or remand of the challenged decision, we simply affirm the decision.

The motion to dismiss for failure to state a claim is denied.

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business or the effects of the disputed condition on either. Memorandum in Support of Motion to Dismiss for Failure to State a Claim 2-3.

FIRST ASSIGNMENT OF ERROR

> "The City's decision to demand the dedication to the City of those portions of Petitioners' land lying 15 feet to the east of the 100-year flood-plain boundary constitutes an unlawful taking in violation of Petitioners' rights under the Oregon and United States Constitutions."

SECOND ASSIGNMENT OF ERROR

> "The city council's exaction of all portions of Petitioners' property falling within the 100 year flood plain constitutes an unlawful taking of private property for public use, in violation of the Oregon and United States Constitutions."

A. Introduction

In the first and second assignments of error, petitioners challenge the validity of the condition imposed by the city requiring petitioners to dedicate to the city the portions of the subject parcel within the 100-year flood plain of Fanno Creek and within 15 feet to the east of the flood plain boundary. Petitioners argue that this condition of site development review approval constitutes a taking, without just compensation, of the 7,000 square feet of their parcel required to be dedicated for public use, in violation of the Fifth Amendment to the U.S. Constitution and Article I, Section 18 of the Oregon Constitution. Fairly read, the petition for review asks that we either reverse the city's imposition of this condition or remand the decision to the city with instructions to remove the invalid condition.

The Fifth Amendment to the U.S. Constitution, made applicable to states and local governments through the Due Process Clause of the Fourteenth Amendment, provides in relevant part:

> "[N]or shall private property be taken for public use, without just compensation."

Article 1, Section 18 of the Oregon Constitution provides in relevant part:

> "Private property shall not be taken for public use * * * without just compensation * * * ."

Petitioners base their federal taking claim on the argument that because the condition requires petitioners to permit physical occupation of the dedicated portion of their property, it constitutes a taking, regardless of the extent of the economic impacts on petitioners' use of their property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 435-436, 102 S Ct 3164, 73 L Ed2d 868 (1982). Petitioners contend that requiring such a taking without compensation, as a condition of development approval, is constitutional only if there is a sufficient nexus between the condition and the impacts of the proposed development. *Nollan v. California Coastal Comm'n*, 483 US 825, 837, 107 S Ct 3141, 97 L Ed2d 677 (1987). The question presented in *Nollan* concerned a condition of approval for replacement of a dwelling with a larger structure. The condition of approval, which required an easement allowing public passage along the subject property between a seawall and the high tide line, was held to be unconstitutional because the condition lacked an essential nexus with the coastal commission's legitimate state interests, e.g., in protecting the public's ability to *see* the beach.

Petitioners contend that such a nexus is lacking in this case.

With regard to petitioners' state taking claim, petitioners contend that the Oregon Supreme Court has never articulated a standard for applying Article I, Section 18 of the Oregon Constitution to conditions of development approval which constitute a physical taking (e.g., dedication of easement). Petitioners argue, however, that we should apply the "reasonable relationship" standard previously used by the Court of Appeals and this Board in other contexts to determine the validity of development exactions. *Hayes v. City of Albany*, 7 Or App 277, 285, 490 P2d 1018 (1971); *O'Keefe v. City of West Linn*, 14 Or LUBA 284, 293 (1986). Petitioners contend there is no "reasonable relationship" between the disputed condition requiring dedication of their property for a greenway and bike path and the impacts of the proposed development.

B. Ripeness

Respondent contends that petitioners' constitutional claims are premature because petitioners failed to exhaust their administrative remedies. Respondent argues that under *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 581 P2d 50 (1978) (exhaustion doctrine requires plaintiff to seek quasi-judicial plan and zoning map amendments before claiming that plan and zoning provisions are unconstitutional as applied to plaintiff's property), whether petitioners exhausted their administrative remedies depends on the answers to three separate questions:

"1. Were the nonjudicial remedies [to be] pursued by the plaintiff truly 'administrative' or were they legislative in nature?

"2. If 'administrative,' were these potential remedies truly available to the plaintiff at the time it filed suit?

"3. If available, were they adequate to address plaintiff's desire to use the subject property as plaintiff wished?" Respondent's Brief 5.

According to respondent, petitioners' constitutional claims are premature because petitioners failed to seek a variance, pursuant to TCDC Chapter 18.134, from the provisions of the TCDC requiring dedication of petitioners' property for greenway and bike path purposes. Respondent argues that the variance process established in TCDC Chapter 18.134 satisfies the three-part *Fifth Avenue Corp.* test for availability of an administrative remedy because a variance under TCDC Chapter 18.134 (1) is an administrative/quasi-judicial remedy, rather than a legislative one; (2) was available to petitioners when their application was filed, and remains available; and (3) if granted, could completely relieve petitioners from the disputed condition requiring dedication of a portion of their property.[6]

[6] Respondent also points out that pursuant to CDC Chapter 18.134, petitioners applied for a variance from certain CDC off-street parking requirements, and the appealed decision includes approval of that variance request.

Petitioners contend they complied with the exhaustion requirement of ORS 197.825(2)(a).[7] Petitioners argue that because they appealed the planning director's decision on their application to the planning commission, and the planning commission's decision to the city council, every city decision maker acted on their application. According to petitioners, having pursued their application to the highest level city decision maker, they are not required to go back to the planning director and request a variance pursuant to TCDC Chapter 18.134. Petitioners rely on *Portland Audubon Society v. Clackamas Co.*, 77 Or App 277, 280-81, 712 P2d 839(1986), which states that ORS 197.825(2)(a) is satisfied if a petitioner has gone to the highest local decision-maker once. Petitioners also cite *Colwell v. Washington County*, 79 Or App 82, 91, 718 P2d 747, *rev den* 301 Or 338 (1986), which states that ORS 197.825(2)(a) does not require pursuit of local remedies that are unlikely to serve any purpose except redundancy.

Petitioners contend that *Fifth Avenue Corp., supra,* is inapplicable here because in that case the Oregon Supreme Court applied the exhaustion of administrative remedies requirement to a claim that certain plan and code provisions were unconstitutional *"as applied to the subject property* in that they were 'arbitrary, capricious [and] unreasonable.' " (Emphasis in original.) *Fifth Avenue Corp.*, 282 Or at 594. According to petitioners, the Court would not impose such an exhaustion requirement

[7] ORS 197.825(2)(a) provides that this Board's jurisdiction:
"Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review."

in this case, because petitioners' contentions are "directed to the validity of county [sic] acts without reference to the specific attributes of the subject property." Petitioners' Reply Brief 4.

Petitioners also contend that a variance pursuant to TCDC Chapter 18.134 was not an available or adequate remedy. TCDC 18.134.010 provides that a variance may be granted where "the literal interpretation of the provisions of *the applicable zone* would cause an undue or unnecessary hardship." (Emphasis added by petitioners.) Petitioners argue that they do not seek relief from any provision of the applicable CBD-AA *zoning district*. Petitioners further argue that no provision of the TCDC mandates that the city require dedication of their property as a condition for approval of development authorized by the plan and TCDC. Petitioners maintain that they do not contend any TCDC provision is unreasonable as applied to their property and, therefore, seeking a variance would not have addressed the issue raised in this appeal.

We agree with petitioners that this appeal of the city council's decision satisfies the exhaustion requirement of ORS 197.825(2)(a), in that petitioners appeal a decision on their application made by the highest possible level of local decision maker. Further, as provided by ORS 197.015(10)(a)(A) and (B) and OAR 661-10-010, that decision became "final" when the decision was reduced to writing and signed by the decision maker. Accordingly, we have *jurisdiction* to review the appealed decision.[8]

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[8] We note that in this appeal petitioners make *only* constitutional challenges to the city's decision.

However, we understand respondent to contend that petitioners' state and federal constitutional taking claims are not *ripe* for resolution because, unless petitioners attempt to obtain administrative relief through a variance pursuant to TCDC Chapter 18.134, petitioners have not obtained a final determination as to *how* the city will apply the TCDC provisions which mandate application of the disputed condition to their property. As we understand it, respondent contends that the requirement that a taking claim be "ripe," as that concept has been explained in decisions of the federal and state appellate courts, requires that a petitioner seek local administrative remedies, such as variances, even though this Board has not in the past imposed a jurisdictional requirement that such remedies first be sought under the exhaustion requirement of ORS 197.825(2)(a) or the requirement of ORS 197.015(10)(a)(A) and (B) that the challenged land use decision be a final decision.

1. Federal Taking Claim

The United States Supreme Court has held that in order for a federal taking claim to be ripe for review, the property owner must obtain the local government's final determination as to how local regulations will be applied to his property. *Agins v. Tiburon*, 447 US 255, 100 S Ct 2138, 65 L Ed2d 106 (1980). In *MacDonald, Sommer & Frates v. Yolo County*, 477 US 340, 348, 106 S Ct 2561, 91 L Ed2d 285 (1986), the Supreme Court stated that ripeness is a requirement for judicial review of taking claims because a court "cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation

goes."[9] Furthermore the United States Supreme Court and other federal courts have held that taking claims are not ripe for review where property owners have failed to seek *variances* from applicable regulations which could have allowed them to develop their property as they wished. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 US 172, 189, 105 S Ct 3108, 87 L Ed2d 126 (1985) (*Hamilton Bank*); *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 US 264, 101 S Ct 2352, 69 L Ed2d 1 (1981) (*Hodel*); *Lai v. City and County of Honululu*, 841 F2d 301, 303 (9th Cir. 1988); *Kinzli v. City of Santa Cruz*, 818 F2d 1449, 1453-1454, *amended* 830 F2d 968 (9th Cir. 1987), *cert den* 484 US 1043, 108 S Ct 775, 98 L Ed2d 861 (1988).

In *Hamilton Bank, supra*, 473 US at 187, the United States Supreme Court quoted with approval the following passage from *Hodel* explaining why a taking challenge to a statute is not ripe where the property owners failed to seek administrative relief through variance and waiver procedures provided by that statute:

> " * * * If [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties,

[9] We note that the requirement that a taking claim be ripe for review has been applied by the Court not only where property owners seek money damages for an alleged taking, but also where property owners seek only declarative and injunctive relief from a local regulation. *Pennell v. City of San Jose*, 485 US 1, 108 S Ct 849, 99 L Ed2d 1 (1988) (action for declaratory and injunctive relief against city, attacking constitutionality of city rent control ordinance).

> thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue * * * simply is not ripe for judicial resolution." *Hodel*, 452 US at 297.

Also in *Hamilton Bank, supra*, 473 US at 190, the Court explained that its unwillingness to review taking claims until property owners obtain a final decision with regard to how they will be allowed to develop their property is "compelled by the very nature of the inquiry required by the Just Compensation Clause." In *Hamilton Bank*, where property owners sought compensation for a regulatory taking, the inquiry required by the Just Compensation Clause concerned primarily the economic impacts of local regulations on the property owners' use of their property. The Court stated that such impacts "cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.*

The reasons for requiring that property owners seek administrative relief through an available variance process for a federal taking claim to be ripe for review, as expressed by the United States Supreme Court in *Hamilton Bank*, apply in this case as well. If a variance process were available under the TCDC which might relieve petitioners of all or part of the disputed condition, a mutually acceptable resolution with regard to petitioners' property might be reached. Furthermore, in this case petitioners' federal taking claim requires analysis of the nexus between the condition imposed, the purpose of the local regulations pursuant to which the condition is imposed and the impacts of the proposed development. Although

the nature of this *"Nollan"* inquiry differs from that required in *Hamilton Bank*, performing such a *Nollan* analysis also requires that the local government have "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[10] *Hamilton Bank*, 473 US at 190.

3 We, therefore, conclude that petitioners' federal taking claim is not ripe for review *if* the variance process of TCDC Chapter 18.134 is an available administrative means for petitioners to seek relief from the disputed condition (see sub-section 3 *infra*).

2. State Taking Claim

The Oregon Supreme Court has also interpreted Article I, Section 18 of the Oregon Constitution to require property owners to use available administrative procedures for development of their property before pursuing a state taking claim, stating that "if a means of relief from the alleged confiscatory restraint remains available, the property has not been taken."[11] *Suess Builders v. City of Beaverton*, 294 Or 254, 262, 656 P2d 306 (1982). Also in *Suess Builders*, the Court cited with approval discussion in *Fifth Avenue Corp.*, 282 Or at 614-21, requiring property

[10] The issue of ripeness was not raised in *Nollan*.

[11] Unlike the United States Supreme Court, which has described the ripeness requirement in terms of obtaining a "final determination" as to how regulations are applied, the Oregon Supreme Court has described what is essentially the same requirement in terms of "exhaustion of administrative remedies."

owners to seek quasi-judicial plan and zone map amendments before pursuing a claim that local regulations were unconstitutional as applied to their property. Finally, in *Dunn v. City of Redmond*, 86 Or App 267, 270, 739 P2d 55 (1987), the Court of Appeals rejected a property owner's taking claim where the property owner had failed to seek conditional use permits potentially available under local regulations.

4 While the Oregon Courts have not specifically addressed whether property owners must pursue a potentially available *variance* before pursuing a state taking claim, a variance is a type of administrative relief, and we see no significant difference between pursuing a variance and pursuing a plan or zone map amendment or a conditional use permit. We, therefore, conclude that petitioners' state taking claim cannot be upheld *if* the variance process of TCDC Chapter 18.134 is an available administrative means for petitioners to seek relief from the disputed condition (see subsection 3 *infra*).

3. Availability of Relief under TCDC Ch 18.134

The disputed condition of approval provides:

> "The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain (*i.e.* all portions of the property below elevation 150.0) and all property within 15 feet above (to the east of) the

150.0 foot floodplain boundary. * * * "[12] Record 38.

In the absence of an adopted design plan, the TCDC Action Area overlay zone imposes the following requirement on the approval of new development:

> "The development shall facilitate pedestrian/bicycle circulation if the site is located * * * adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:
>
> "(i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments *by requiring dedication and construction of pedestrian and bikepaths* identified in the comprehensive plan. * * *
>
> "* * * * * *" (Emphasis added.) TCDC 18.86.040.A.1.b.

Additionally, the TCDC site development review approval standards include the following:

> "Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City *shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain*. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." (Emphasis added.) TCDC 18.120.180.A.8.

[12] The city's finding further indicate that the purpose of requiring dedication of property to the east of the existing flood plain boundary is to accommodate storm drainage improvements planned for in the city's Master Drainage Plan and the bike path shown on the city's Master Plan for Fanno Creek Park. Record 38.

Finally, the city's Master Plan for Fanno Creek Park, which has been adopted as part of the city's comprehensive plan, depicts a portion of petitioners' property adjoining Fanno Creek as greenway and shows the existence of a bike path on this portion of petitioners' property. Parks Master Plans, fig. 2.

Petitioners do not dispute the applicability of the above quoted TCDC provisions to the proposed development. It is clear that the disputed condition requiring dedication of a portion of petitioners' property was adopted pursuant to these TCDC provisions. Therefore, if the variance process of TCDC Chapter 18.134 is an available administrative means of obtaining relief from the above quoted provisions, petitioners are required to seek that relief before pursuing either a federal or state taking claim.

The purpose section of TCDC Chapter 18.134 states:

> "The purpose of this chapter is to provide standards for the granting of variances *from the applicable zoning requirements of this title* where it can be shown that, owing to special and unusual circumstances related to a specific piece of the land, the *literal interpretation of the provisions of the applicable zone* would cause an undue or unnecessary hardship, except that no use variances shall be granted." (Emphasis added.) TCDC 18.134.010.

We do not agree with petitioners' argument that the city's use of the phrase "literal interpretation of the provisions of the applicable zone," emphasized above, is a sufficient basis for concluding that the variance process of TCDC Chapter 18.134 is applicable only to provisions of the TCDC's *zoning districts*, and not to provisions in the TCDC's Site Development Review Chapter, such as TCDC 18.120.180.A.8.[13] The purpose section of TCDC Chapter 18.134 also refers to granting variances from "the applicable zoning requirements of this title," indicating that a variance is potentially available from any provision of the TCDC. Further, TCDC 18.134.050.B and C indicates that variances to certain TCDC provisions (subdivision and access requirements) cannot be approved under TCDC Chapter 18.134. Thus, the TCDC indicates the two instances where the variance process of TCDC Chapter 18.134 is *not* applicable. We believe that if the city had intended TCDC Chapter 18.134 to be applicable *only* to the zoning district provisions of TCDC Chapters 18.40 to 18.86, it would have so indicated.

Because the variance process of TCDC Chapter 18.134 provides petitioners with a means of seeking administrative relief from the disputed condition requiring dedication of a portion of their property, and petitioners have not pursued that relief, petitioners' federal and state taking claims are not ripe for review.

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[13] We note that the TCDC 18.86.040.A.1.b(i) requirement for dedication of land for pedestrian and bike paths quoted above is a provision of the AA overlay *zoning district* and, therefore, would be subject to the variance process of TCDC Chapter 18.134 even under petitioners' interpretation of the applicability of TCDC Chapter 18.134.

The first and second assignments of error are denied.

THIRD ASSIGNMENT OF ERROR

> "The city's requirement that the 'roof sign' be removed within 45 days of occupancy of the new building was unreasonable and hence a denial of due process."

The challenged decision includes the following condition:

> "The existing roof sign shall be permanently removed from the subject property within 45 days of the issuance of the Occupancy Permit for the new building." Record 40.

Petitioners contend the "roof sign" referred to in the above quoted condition is a structural part of the existing building which is planned to be demolished after occupancy of the new building. Petitioners argue that it is unreasonable to require them to move their retail business into the new building, obtain a demolition permit and raze the existing structure, all within 45 days of receiving an occupancy permit for the new building. Petitioners state they told the city they would agree to a 90 day period, and complain that the city's decision does not articulate reasonable grounds for reducing that time period to 45 days.

5 Petitioners do not challenge the city's authority to require that they remove the existing roof sign as a condition of site development review approval. Rather, petitioners contend that allowing them only 45 days after obtaining an occupancy permit for the new building to accomplish removal of the sign, rather than 90 days, is a

"denial of due process." Petitioners presumably intend this phrase to indicate that the city's decision is unconstitutional in some way and, therefore, subject to reversal or remand under ORS 197.835(7)(a)(E). However, no argument supporting an allegation of unconstitutionality is provided in the petition for review. This Board has consistently declined to consider claims of constitutional violations where, as here, they are unsupported by legal argument. *Van Sant v. Yamhill County*, 17 Or LUBA 563, 566-67 (1989); *Faulkender v. Hood River County*, 17 Or LUBA 360, 366 (1989); *Portland Oil Service Co. v. City of Beaverton*, 16 Or LUBA 255, 269 (1987); *Chemeketa Industries Corp. v. City of Salem*, 14 Or LUBA 159, 165-66 (1985).

The third assignment of error is denied.

The City's decision is affirmed.

APPENDIX F

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JOHN T. DOLAN and FLORENCE DOLAN, Petitioners, vs. CITY OF TIGARD, Respondent.	)	LUBA No. 91-161 NOTICE OF APPELLATE JUDGMENT

The Court of Appeals issued an opinion in *Dolan v. City of Tigard*, CA A73769, on May 20, 1992. The Supreme Court issued an opinion in *Dolan v. City of Tigard*, SC 39393, on July 1, 1993. The appellate judgment was filed on July 28, 1993.

The appellate court decisions in this case require no change in our final opinion and order dated February 7, 1992.

The city's decision is affirmed.

Dated this 9th day of August, 1993.

/s/ Corinne C. Sherton
Corinne C. Sherton
Chief Referee

APPENDIX G

CITY OF TIGARD, OREGON

RESOLUTION NO. 91-66

IN THE MATTER OF THE ADOPTION OF A FINAL ORDER UPON CITY COUNCIL REVIEW OF AN APPEAL OF A PLANNING COMMISSION DECISION TO APPROVE A SITE DEVELOPMENT REVIEW AND VARIANCE APPLICATION (SDR 91-0005, VAR91-00100) PROPOSED BY JOHN DOLAN.

WHEREAS, a Director's decision was appealed to the Planning Commission by the applicant for further consideration; and

WHEREAS, the Commission reviewed the case at its meeting of July 8, 1991; and

WHEREAS, the Commission upheld the Director's decision with modification to the original conditions of approval (Final Order No. 91-09 PC); and

WHEREAS, this matter came before the City Council at its meeting of September 10, 1991, upon the request of the applicant; and

WHEREAS, the Council reviewed the evidence related to the applicant's appeal; and

THEREFORE BE IT RESOLVED, that the requested appeal is allowed in part and denied in part, and the Planning Commission decision is upheld as modified based upon the facts, findings, and conclusions noted in Planning Commission Final Order No. 91-09 PC (Exhibit "A" as modified)

The Council further orders that the City Recorded send a copy of this final order to the applicant as a notice of the final decision in this matter.

PASSED: This 10th day of September, 1991.

APPROVED: This 17th day of September, 1991.

/s/ Gerald R. Edwards
Gerald R. Edwards, Mayor
City of Tigard

ATTEST:

/s/ Catherine Wheatley
Tigard City Recorder

CITY OF TIGARD
Washington County, Oregon

NOTICE OF FINAL ORDER - BY CITY COUNCIL

1. Concerning Case Number(s): SDR 91-0005/ VAR91-0010 (Appeal)
2. Name of Owner: John T. & Florence Dolan
   Name of Applicant: Knappenberger & Mendez
3. Address 1318 SW 12th Avenue City Portland State OR Zip 97201
4. Address of Property: 12520 SW Main Street
   Tax Map and Lot No(s).: 2S1 2AC, tax lot 700
5. Request: An appeal by John Dolan of a Planning Commission decision to deny a requested variance subject to conditions requiring the applicant to: (1) dedicate to the City as greenway all property within the 100 year

flood plain; (2) dedicate property 15 feet above the 150 foot floodplain boundary for a pathway; (3) survey the boundaries of the dedication; and (4) remove a roof sign within 45 days of the issuance of an occupancy permit for the new building. ZONE: CBD-AA (Central Business District zone with the Action Area overlay zone)

6. Action:
   ___ Approval as requested
   ___ Approval with conditions
   ___ Denial
   X Approved in part, denied in part

7. Notice: Notice was published in the newspaper, posted at City Hall, and mailed to:
   X The applicant and owner(s)
   X Owners of record within the required distance
   X The affected Neighborhood Planning Organization
   X Affected governmental agencies

8. Final Decision: THE DECISION WAS SIGNED ON 9/17/91, AND BECOMES EFFECTIVE ON 9/17/91.

   The adopted findings of fact, decision, and statement of conditions can be obtained from the Planning Department, Tigard City Hall, 13125 SW Hall, P.O. Box 23397, Tigard Oregon 97223.

   A review of this decision may be obtained by filing a notice of intent with the Oregon Land Use Board of Appeals (LUBA) according to their procedures.

9. QUESTIONS: If you have any questions, pleas call the Tigard City Recorder at 639-4171.

EXHIBIT "A"

CITY OF TIGARD PLANNING COMMISSION
FINAL ORDER NO. 91-09 PC

A FINAL ORDER INCLUDING FINDINGS AND CONCLUSIONS WHICH UPHOLDS A DECISION OF THE COMMUNITY DEVELOPMENT DIRECTOR'S DESIGNEEE [sic] (SDR0005) AND VARIANCE (VAR 91-0010) REQUESTED BY JOSEPH MENDEZ (JOHN AND FRANCES DOLAN, PROPERTY OWNERS).

The Tigard Planning Commission has reviewed the above application, on appeal, at a public hearing on July 8, 1991. The Commission has based its decision on the facts, findings, and conclusions noted below.

SUMMARY OF APPLICATION

REQUEST:
a) Site Development Review approval is requested to allow construction of a 17,600 square foot retail sales building on a 1.67 acre site;

b) Variances are requested to the following Community Development Code requirements:

   ___ i. Code Section 18.120.180.A.8 (Site Development Review approval standards) which requires dedication of sufficient open land area for greenway adjoining and within the floodplain where development is allowed adjacent to the 100-year floodplain. In addition, this section requires that the dedication include area at a suitable elevation

for the construction of a pedestrian/bicycle pathway. The requirement of area for a pathway as well as construction of the pathway is also made by Code Section 18.86.040.A.1.b (Action Area overlay zone interim requirements). The applicant requests that floodplain and pathway areas not be required to be dedicated and also that pathway construction not be required as a condition of approval of the Site Development Review request.

ii. Section 18.106.030.C.20 (minimum off-street parking requirements) which requires provision of one off-street parking space for every 400 square feet of general retail sales area. The applicant requests approval of a site plan that would provide a 39 parking space parking lot whereas 44 spaces would be required for the size of the proposed building to be used for general retail sales.

iii. Section 18.114.070.H (certain signs prohibited) which prohibits roof signs of any kind. The applicant requests that the City not require removal of a sign above the roof line of an existing building on the site as a condition of approval of the current development application. The applicant characterizes

the sign as a wall sign built on a wall parapet.

APPLICANT: Joseph R. Mendez, Attorney at Law
1318 SW 12th Avenue
Portland, OR 97201

OWNER: John and Florence Dolan
1919 NW 19th Avenue
Portland, OR 97209

LOCATION: 12520 SW Main Street (WCTM 2S1 2AC, TL 700)

COMPREHENSIVE PLAN DESIGNATION: Central Business District

ZONE DESIGNATION:CBD-AA (Central Business District, Action Area overlay zone)

PRIOR BACKGROUND

The property's owners previously applied for Site Development Review approval for plans that are largely the same as the plans that are presently under review. The applicant also requested a variance to the parking standard for general retail sales to allow 39 parking spaces to serve development on the site whereas 44 spaces would normally be required. The Site Development Review and the Variance requests were approved on July 10, 1989 by the Planning Director subject to 14 conditions.

The applicant appealed the Director's decision to the Planning Commission. The applicant raised concerns with five conditions of approval that were imposed by the Director's decision, including conditions requiring floodplain and greenway area dedication, construction of a

bicycle/pedestrian pathway within the greenway to be accomplished by the applicant, and removal of a non-conforming roof sign from an existing building prior to the issuance of an occupancy permit for the new building. The Planning Commission upheld the Director's decision, except that the condition requiring removal of the roof sign was modified to require removal to occur within 45 days of the issuance of the occupancy permit (Final Order PC 89-25 dated December 15, 1989).

The applicant then appealed the Planning Commission's decision to the City Council challenging the same five conditions. The City Council upheld the Planning Commission's decision, with one modification. The Council reassigned the responsibility for surveying and marking the floodplain area from the applicant to the City's engineering/surveying department (Council Resolution 90-07 dated February 5, 1990).

The applicant appealed the Council's decision to the Oregon Land Use Board of Appeals (LUBA). On January 24, 1991, LUBA denied the appeal thereby upholding the City's decision on this matter (LUBA Final Order and Opinion No. 90-029).

Prior to the above-described Site Development Review and Variance request, the only other City of Tigard land use or development actions directly related to this parcel are a series of notices regarding nonconforming signs on the property. Two freestanding billboard signs and one large roof sign on the property have been considered nonconforming as of March 20, 1988, and property and business owners were notified

of this prior to that time. A voluntary compliance agreement has been used to provide affected downtown properties an extension of time until a City Center Plan is adopted. The voluntary compliance agreement sent to the owners of the subject parcel has never been signed. The property and business owners have been cited for the following nonconformities:

A. Roof sign, a violation of Section 18.114.070.H; and

B. Two nonconforming, amortized billboards (illegal location), violations of Code Section 18.114.090.A.4.a.

SITE INFORMATION AND PROPOSAL DESCRIPTION

Properties surrounding the subject site are also zoned CBD-AA (Central Business District – Action Area) and contain a variety of commercial uses. Property immediately to the west contains the Fanno Creek floodplain and is designated in Tigard's Comprehensive Plan to be included as part of the City's greenway/open space system.

The subject site is approximately 1.67 acres in size and is bordered by Fanno Creek on the southwestern side. The site includes a 9,700 square foot building and a partially paved parking lot which have been in their present locations since approximately the late 1940s. A freestanding sign with a readerboard stands along the Main Street frontage of the property. Two large billboards stand on or near the property's northeastern boundary.

The property's owners plan to raze the existing structure, currently used by A-Boy Electric and Plumbing Supply – a general retail sales use, and to embark on a multi-phase redevelopment of the site. The building will be razed in sections corresponding to progress on the construction of the first phase of redevelopment of the site. The current proposal includes development of a 17,600 square foot, single story structure on the southwestern side of the site for relocation of the A-Boy Electric and Plumbing Supply operations. The plans also show an outline of a phase two building on the northeastern side of the site. No details have been provided for the building in phase two.

A parking lot containing 39 parking spaces intended to serve the phase one building is proposed between the two phases. One designated handicapped parking space and a 3 bicycle rack are also proposed. The site plan also indicates an area for additional parking for phase two.

The applicant requested variances to Community Development Code standards requiring dedication of area of the subject parcel that is within the 100 year floodplain of Fanno Creek and dedication of additional area adjacent to the 100 year floodplain for a bicycle/pedestrian path, as well as the requirement for construction of the pathway in this area. In addition, the applicant requested a variance to the Code prohibition against roof signs. Through this request, the applicant is requesting reconsideration of the earlier City determination that an existing sign on the present building on the site is a roof sign. The applicant also requested reconsideration of an earlier Council directive that would

require the sign on the existing building to be removed within 45 days of occupancy of the proposed new building.

In addition, staff also considered a variance request previously made by the property's owners in 1989 for a reduction in parking spaces, even though the applicant neglected to raise this issue with the current application. The parking variance considered would allow 39 parking spaces to suffice for the proposed phase one development whereas Community Development Code Section 18.106.030.C.20 requires one parking space for every 500 square feet of building area for general retail sales, or in this case 44 spaces. The City is under no obligation to reconsider this variance since the applicant failed to raise the issue with the current application; however the Commission believes there is a need to reconsider the variance for the City's own administrative purposes. The variance is reconsidered as part of the present application so that there will not be different approvals with different approval periods regarding this site and site plan. The previously approved variance related to parking was issued by the City Council on February 5, 1990. This approval is valid for eighteen months from the date of issuance. Therefore, that approval is likely to expire before development proposed by the current application can begin. Reconsideration and reapprova[illegible]the parking variance at this time would reset the clock for that variance so that the variance approval period would be concurrent with the approval period for the new Site Development Review application. On May 24, 1991, the Community Development Director's designee approved the Site Development

Review request and the Variance related to parking. The approval was subject to 16 conditions. The other variance requests were denied.

AGENCY AND NPO COMMENTS

The City Building Division notes that a canopy and an 8-foot tall solid plywood fence must be installed behind the sidewalk/public right-of-way along SW Main Street (from the southwestern property line to a minimum of 20 feet beyond the new building) prior to start of construction and must remain until all construction is complete (Uniform Building Code section 4407(c). A demolition permit will be required for the removal of any or all of the existing building.

The City Engineering Division has reviewed the proposal and has the following comments:

A. Streets:

The site fronts S.W. Main Street which is classified as a major collector street. Main Street along the site's frontage is fully developed with curbs and sidewalks.

A 1986 engineering study of the condition of S.W. Main Street recommends that the pavement be completely reconstructed and that the storm drainage system be replaced. It appears to be impractical to perform the proposed reconstruction of Main Street in a piecemeal fashion on a lot-by-lot basis; instead, the reconstruction needs to occur in larger segments beginning at Fanno Creek Bridge and working uphill. Therefore, we do not propose that any reconstruction of

Main Street be required as a condition of approval of this development proposal.

This development should be required to replace any existing sidewalks and curbs which are damaged or in poor repair and to reconstruct any existing curb cuts which are being abandoned.

As part of the Tigard Major Streets Transportation Safety Improvement Bond, the City plans to replace the Main Street Bridge over Fanno Creek. The bridge replacement is scheduled to begin in June 1991. The bridge construction is expected to occur within the existing right-of-way and should have little impact on the subject site.

B. Sanitary Sewer:

There are two sanitary sewer truck lines that cross the site in existing easements. One line is 24 inches in diameter and the other is 60 inches in diameter. The applicant has shown on the application plans the easement and location for the 24 inch line but not the easement and location for the 60 inch line. Additionally, after reviewing the sanitary sewer system plans on file in this office, it appears that there may be some mix-up as to where the sanitary sewer system is as shown on the applicants submitted plans. Basically, it appears that the 24 inch line is within a 10 foot easement and goes along the front of the proposed new building and diverges to the east as you go south. The 60 inch line is within a 30 foot easement and again is in front of the proposed new building but does not diverge as fast to the east as you go south. Based on

the plan submitted by the applicant and the "as-built" plans for both the sanitary sewer systems, it appears that the new building would be located over the easement for the 60 inch line by approximately 6 to 8 feet at the approximate middle of the building. Therefore, the applicant should be required to submit evidence as to the actual location of the sanitary sewer lines and easements, and their relationship to the proposed building. If it is determined that the submitted proposal for the building does encroach upon the easement, the applicant should be required to change the location of the building or the design so that it does not encroach upon the easement or to provide evidence that the Unified Sewerage Agency does not object to the encroachment.

C. Storm Sewer:

The City's Master Drainage Plan recommends improvements to the Fanno Creek channel downstream from Main Street. The proposed channel improvements would include widening and slope stabilization. These improvements would move the location of the top of bank approximately five feet closer to the proposed building than the location of the existing top of bank. Therefore, an adjustment of the building location will have to occur in order to accommodate the future City-initiated relocation of the floodplain bank. This should be required on a revised site plan. In addition, dedication of the land area on this property below the elevation of the 100-year flood should be required.

The Unified Sewerage Agency has established and the City has agreed to enforce (Resolution No. 90-43) Surface Water Management Regulations requiring the construction of on-site water quality facilities or fees in lieu of their construction. Requiring surface water quality facilities on small sites could result in numerous facilities that could become a maintenance burden to the City. Furthermore, the applicant has not proposed any such facilities and there are no natural depressions or other areas of this site that are particularly suitable for water quality facilities. Regional facilities, funded by fees in lieu of construction of smaller isolated facilities, would provide the required treatment with improved reliability and less maintenance. Consequently a fee-in-lieu of the construction of on-site water quality facilities should be assessed.

D. Traffic Impact Fee:

Washington County has established and the City has agreed to enforce (Resolution No. 90-65) Traffic Impact Fees. The purpose of the fee is to ensure that new development contributes to extra-capacity transportation improvements needed to accommodate additional traffic generated by such development. The applicant will be required to pay the fee.

Based on the following information, the *ESTIMATED TIF* for this development would be:

1) Use: Retail Sales

2) Land Use Category: Business & Commercial

3) Rate per trip: $34.00

4) ITE Category: 816

5) Weekday average trip rate: 53.21 per T.G.S.F.

6) Existing Square Footage: 9,720 approximately

7) Proposed Square Footage: 17,600

8) TIF = 53.21 X (17.6 - 9.720) X $34.00 = $14,256.02

NOTE: THIS IS ONLY AN ESTIMATE OF THE APPLICABLE TIF FEE. THE ACTUAL FEE WILL BE CALCULATED AT TIME OF BUILDING PERMIT APPLICATION. The actual TIF will be based on the total square footage shown in the building plans, the trip rate in effect at the time of building permit application, and the fee rate in effect at that time.

The City of Tigard Parks Department recommends that area adjacent to the floodplain should be required to be dedicated for pathway construction.

The Tualatin Valley Fire and Rescue District notes that automatic sprinkler protection or some other means of built-in fire protection will be required. In addition, a fire hydrant must be provided within 500 feet of all exterior portions of the proposed structures, but not greater than 70 feet from a fire department connection.

Portland General Electric and the Tigard Water District, have reviewed the proposal and have no objections to it.

No other comments were received.

ANALYSIS AND CONCLUSION

Section 18.120.180 lists the standards whereby the approval authority is to approve, approve with modifications or deny a request for Site Development Review approval. In addition to those contained in Chapter 18.66, Central Business District, the following sections of the Tigard Community Development Code are also applicable: Chapter 18.86, Action Areas; Chapter 18.100, Landscaping and Screening; Chapter 18.102, Visual Clearance Areas; Chapter 18.106, Off-street Parking and Loading; Chapter 18.108, Access, Egress and Circulation; Chapter 18.114, Signs; Chapter 18.120, Site Development Review; and Chapter 18.134, Variances.

In addition to all of the above approval criteria, this order will review the proposal in light of the Parks Master Plan for Fanno Creek Park.

Chapter 18.66: Central Business District Zone

The applicant intends to construct a new and larger structure suited for general retail sales use. Such a use is permitted outright in the CBD (Central Business District) zone. Therefore, the intended use is acceptable for this site.

The CBD zoning district does not require any minimum building setbacks except that a 30 foot setback is required if any side of the property abuts a residential zoning district. Since none of the four sides of the subject property abut a

residential zoning district, no other building setbacks are required. The proposed 16.5 building height is consistent with the maximum 80 foot building height permitted in the zone.

In the CBD zoning district, maximum site coverage allowed is 85 percent. Site coverage includes all structures and impervious surfaces such as parking, loading areas, sidewalks and pathway areas. A minimum of 15 percent of the site must be landscaped. These standards will be reviewed during the discussion of landscaping and screening below.

Chapter 18.86: Action Area Overlay Zone

The "AA" portion of the subject site's zoning designation indicates that an additional "layer" of zoning regulations has been imposed on this property. The purpose of the Action Area Overlay designation is to implement the policies of the Tigard Comprehensive Plan for action areas which include provisions for a mixture of intensive land use. Since permitted uses in the Action Area overlay zone must be those specified in the underlying zoning district; in this case, the CBD zone; this requirement has been met.

Code Section 18.86.040 contains interim standards which are to be addressed for new developments in the CBD-AA zone. These requirements are intended to provide for projected transportation and public facility needs of the area. The City may attach conditions to any development within an action area prior to adoption of the design plan to achieve the following objectives:

a. The development shall address transit usage by residents, employees, and customers if

the site is within 1/4 mile of a public transit line or transit stop. Specific items to be addressed are as follows:

i. Orientation of buildings and facilities towards transit services to provide for direct pedestrian access into the building(s) from transit lines or stops;

ii. Minimizing transit/auto conflicts by providing direct pedestrian access into the buildings with limited crossings in automobile circulation/parking areas. If pedestrian access crosses automobile circulation/parking areas, paths shall be marked for pedestrians;

iii. Encouraging transit-supportive users by limiting automobile support services to collector and arterial streets; and

iv. Avoiding the creation of small scattered parking areas by allowing adjacent development to use shared surface parking, parking structures or under-structure parking;

b. The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designated bike paths or adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:

i. Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bike paths identified in the comprehensive

plan. If direct connections cannot be made, require that funds in the amount of the construction cost be deposited into an account for the purpose of constructing paths;

ii. Separation of auto and truck circulation activities from pedestrian areas;

iii. Encouraging pedestrian-oriented design by requiring pedestrian walkways and street level windows along all sides with public access into the building;

iv. Provision of bicycle parking as required under Subsection 18.106.020.P; and

v. Ensure adequate outdoor lighting by lighting pedestrian walkways and auto circulation areas.

c. Coordination of development within the action area. Specific items to be addressed are as follows:

i. Continuity and/or compatibility of landscaping, circulation, access, public facilities, and other improvements. Allow required landscaping areas to be grouped together. Regulate shared access where appropriate. Prohibit lighting which shines on adjacent property;

ii. Siting and orientation of land use which considers surrounding land use, or an adopted plan. Screen loading areas and refuse dumpsters from view. Screen commercial, and industrial use

from single-family residential through landscaping; and

iii. Provision of frontage roads or shared access where feasible.

The submitted development proposal satisfies the above requirements for transit usage. The subject site is within one quarter mile of several Tri-Met bus stops on Main Street and Pacific Highway. The site plan provides an on-site sidewalk providing a direct connection between the public sidewalk on Main Street with the entrance to the proposed building. The proposed parking lot's relatively narrow width will minimize pedestrian/vehicle conflicts because of the relatively short distance pedestrians must travel between their cars and the sidewalk and entrance to the building.

The proposed development plan is reasonably coordinated with other development within the action area. The site improvements will be required to satisfy Code landscaping requirements as described below. Screening of the truck loading area on the southern portion of the building can be accomplished with either a fence or tall vegetation. Outdoor lighting should be specifically addressed by the applicant as to how it might be provided. These modifications or clarifications can be accomplished as minor amendments to the site plan prior to building permit issuance.

The proposal is consistent with only some of the Action Area overlay zone requirements related to pedestrian and bicycle circulation, as described below. Pedestrian areas are adequately separated from vehicle circulation areas

by curbs and landscaped areas. The northeastern side of the building will include a pedestrian walkway and windows along the side of the building that will provide pedestrian access. Adequate lighting of the public and private sidewalks and the parking lot will be provided by parking area lights and building mounted lights. The proposed development would be provided with adequate bicycle parking as required by Code Section 18.106.020.P which requires one bicycle rack parking space for every 15 auto spaces, or portion thereof. The site plan proposes a three-bicycle bike rack at the northeastern corner of the building, adjacent to the public sidewalk.

Variance requested. The application includes a request for a variance from the requirement of dedication of adequate area for and construction of a bicycle/pedestrian path along the site's western side adjacent to Fanno Creek as well as dedication of the floodplain area on the site itself. Because the requirement for pathway area and construction is raised by Code Section 18.86.040 separate from the requirement for floodplain dedication and dedication of sufficient area for a pathway, the Commission will consider the requirement for floodplain dedication separately later in this report.

A bicycle/pedestrian path is called for in this general location in the City of Tigard's Parks Master Plans (Murase and Associates, 1988) and the Tigard Area Comprehensive Pedestrian/Bicycle Pathway Plan 1974). In addition, Community Development Code Section 18.120.180.A.8 requires that where landfill and/or development is allowed within or adjacent to

the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with adopted pedestrian/bicycle plan. The proposed development site includes land within the 100-year floodplain of Fanno Creek.

Section 18.1.34.050 of the Code contains criteria whereby the decision-making authority can approve, approve with modifications or deny a variance request:

(1) The proposed variance will not be materially detrimental to the purposes of this Code, be in conflict with the policies of the Comprehensive Plan, to any other applicable policies of the Community Development Code, to any other applicable policies and standards, and to other properties in the same zoning district or vicinity.

(2) There are special circumstances that exist which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, and which are not applicable to other properties in the same zoning district;

(3) The use proposed will be the same as permitted under this Code and City standards will be maintained to the greatest extent possible, while permitting some economic use of the land;

(4) Existing physical and natural systems, such as but not limited to traffic, drainage, dramatic land forms or parks will not be adversely affected any more than would

occur if the development were located as specified in the Code; and

(5) The hardship is not self-imposed and the variance requested is the minimum variance which would alleviate the hardship.

Applicant's Variance Justification. The applicant has provided the following as a statement of justification that is intended to cover all of the requested variances:

> The variance requested by the applicant should be allowed as the conditions and dedications required by the City of Tigard violate the applicant's rights under the Oregon and United States Constitutions. Specifically, the City's demand for dedication constitute an unlawful taking and violation of the Oregon Constitution, Article 1, Section 18 and the Fifth Amendment to the United States Constitution.
>
> The proposed variance will not materially be detrimental to the purposes of the title nor conflict with the policy of the comprehensive plan as no park exists at this time nor does the City have sufficient funding in which to create a park that the bicycle/pedestrian path is theoretically going to be used to access.
>
> There are special circumstances that exist which are peculiar to the lot in that the building which the applicant proposes to construct cannot be erected without invading the City's proposed bicycle/pedestrian path if the land is dedicated.
>
> The hardship is not self-imposed but rather imposed by the City's dedication and the

> variance requested is the minimum variance which would alleviate the hardship to the applicant.

Analysis of Variance Request. The Commission does not find that the requirements for dedication of the area adjacent to the floodplain for greenway purposes and for construction of a pedestrian/bicycle pathway constitute a taking of the applicant's property. Instead, the Commission finds that the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

The Commission finds that the requested variance would conflict with many Plan and Code

purposes. As already noted, the Code at Section 18.120.080.A.8 and many other related sections (e.g., Section 18.84.040.A.7) require dedication of sufficient area adjacent to floodplain areas for construction of pedestrian/bicycle pathways. Volume 1 of the Comprehensive Plan at pages 256 through 258 provides a discussion of the reasons for development of a City-wide pathway system as part of a multi-modal transportation system serving the varied needs of the City's citizens and businesses. This section essentially summarizes the findings of the adopted Tigard Area Comprehensive Pedestrian/Bicycle Pathway Plan. Comprehensive Plan Volume 2 at Policy 8.4.1 calls for the City to require the dedication of area for and construction of pedestrian/bicycle pathways as a condition of development approval for areas identified by the adopted pedestrian/bicycle plan. The Plan notes that as the city grows, more people may rely on the pathways for utilitarian as well as recreational purposes and that there is a need to develop a safe and convenient pathway system. The pathway system along Fanno Creek near the subject site is already partly constructed in both directions. The City is actively pursuing land acquisition and park improvement planning for Fanno Creek Park to the south. Contrary to the applicant's statement that "... no park exists at this time nor does the City have sufficient funding in which to create a park that the bicycle/pedestrian pathway is theoretically going to be used to access," the City has established Fanno Creek park, constructed a pathway and other improvements in area to the south, recently purchased 3.19 additional acres for park expansion, and has set aside funds for a

partial extension of the pathway in the summer or fall of 1991.

It is imperative that a continuous pathway be developed in order for the paths to function as an efficient, convenient, and safe system. Omitting a planned for section of the pathway system, as the variance would result in if approved, would conflict with Plan purposes and result in an incomplete system that would not be efficient, convenient, or safe. The requested variance therefore would conflict with the City's adopted policy of providing a continuous pathway system intended to serve the general public good and therefore fails to satisfy the first variance approval criterion.

The Commission fails to find special circumstances that exist which are peculiar to this site for which the applicant has no control and therefore the second criterion for approval of a variance is not satisfied. The applicant states that the inability to develop the proposed building without invading the City's intended pathway area is a special circumstance dictating the need for a variance. The design of the building is completely under the control of the applicant. The applicant's engineer was apprised of the need to provide area for the pathway at the pre-application conference with City staff prior to the submittal of the site plan. The applicant's engineer could have designed the building with respect to the need for dedication for the pathway. The applicant has not submitted any reasons supporting why the same amount of building square footage could not be provided on multiple levels or why the proposed square

footage is needed. If the building must be developed on a single level and at the same square footage, other options may exist for varying Code standards that would not have such a detrimental effect on public purposes as the requested variance. The Commission finds that the applicant has not met the burden of proof regarding special circumstances affecting this site related to the requested variance.

The requested variance would not affect uses of the site permitted by the Code. The applicant has not addressed how City standards (i.e., the connection of the various pathway segments) will be accomplished if the variance request is approved. Therefore, the third variance approval criterion is only partially satisfied.

As noted above, approval of the variance request would have an adverse effect on the existing partially completed pathway system because a system cannot fully function with missing pieces. If this planned for section is omitted from the pathway system, the system in this area will be much less convenient and efficient. If the pedestrian and bicycle traffic is forced onto City streets at this point in the pathway system because of this missing section, pedestrian and bicycle safety will be lessened. The fourth variance approval criterion is therefore not satisfied.

As noted above, the applicant has not provided reasons why the building must be constructed with the proposed footprint, square footage, or on a single level. Without such evidence, the Commission finds no evidence of hardship that would result if strict compliance with the Code dedication and pathway construction standards

are required. Again, the Commission finds that the applicant has not satisfied the burden of proof related to the variance request. Without evidence of a hardship, the fifth variance approval criterion is not met.

The criteria for approval of a variance to the Community Development Code requirement of dedication of sufficient area for and construction of a pedestrian/bicycle pathway in conformance with various adopted City plans calling for the pathway are therefore not satisfied. The applicant has failed to provide adequate evidence or reasons addressing the criteria. The request is therefore denied. The applicant will be required to dedicate area 15 feet in depth from the east bank of Fanno Creek and will be required to construct an 8 foot wide pedestrian/bicycle pathway in this area. The footprint and possibly the design of the proposed building will need to be revised to comply with this requirement.

Chapter 18.102: Landscaping and Screening

Although not noted in the submittal for the current application, the applicant previously has requested that in return for dedication of property along Fanno Creek, other landscaping standards should be waived. The Commission will consider an exception from the minimum landscaped site area on the net site after required dedications because this decision rejects the applicant's variance requests from floodplain and pathway dedication requirements.

The Planning Commission finds that the City has previously allowed the inclusion of dedicated floodplain/park land for the purpose of

calculating required landscaped area for other projects. Such an allowance is also appropriate in this instance. The site plan does not note the amount of landscaped area that would be provided on the net site after floodplain and pathway area dedications, but the plan notes that 21 percent of the gross site would be landscaped area or natural area. This percentage is consistent with the 15 percent minimum landscaped area standard of the CBD zoning district as well as with Section 18.120.170.E which allows the director to grant an exception to the minimum landscaped area requirements upon a finding that the overall landscaped plan provides for at least 20 percent of the gross site to be landscaped.

The City Council decided, with regard to the earlier Site Development Review request for this site, that the City would be responsible for landscaping and screening the area between the required pedestrian/bicycle path and the proposed building. The Commission will hold with the Council's earlier decision regarding this area and therefore will not review the applicant's landscaping plans for this area adjacent to the future pathway and Fanno Creek. The provision of a landscaped buffer by the City along the east edge of area required to be dedicated for pathway purposes is justified because the maintenance of this area will be the City's responsibility and the future storm drainage and pathway improvements will cause the destruction or removal of existing vegetation.

Code Section 18.100.030.A requires that all development projects fronting on a public or private street provide street trees spaced

between 20 and 40 feet, depending on the mature size of the trees. The site plan proposes only one flowering pear tree along the site's Main Street frontage. The proposed flowering pear tree would be located in a planter on the west side of the entrance driveway to the parking lot. Because the proposed building would abut the public sidewalk further west from the driveway, no additional trees can be located west of the driveway. The City will be responsible for landscaping west of the proposed building. This area should include a street tree or two. Approximately 85 feet to the east of the proposed driveway is not shown to include any landscaping, building, or paving. The landscaping plan will need to be revised to include additional street trees consistent with the size and spacing standards of Section 18.100.035.

Chapter 18.102: Vision Clearance

Section 18.102.020 requires that clear vision be maintained between 3 and 8 feet above grade at the intersections of all streets and driveways. The flowering pear tree intended to be planted immediately to the west of the proposed driveway need not be relocated out of this area as long as branches below eight feet in height are kept trimmed. In addition, bushes planted adjacent to the tree must be kept trimmed to below three feet in height.

Chapter 18.106: Off-street Parking and Loading

Variance to Minimum Parking Standard. The applicant proposes to construct 39 standard 90-degree parking spaces. Community Development Code Section 18.106.030.C.20 requires that

1 parking space be provide for every 400 square feet of building area. Therefore, 44 parking spaces would be required for the proposed 17,600 square foot general retail sales building. As previously noted, the applicant neglected to request a variance to this parking standard with the current request. However, the director and the Planning Commission had previously approved such a request for the earlier application utilizing the same site plan. The Commission will consider a variance to the minimum parking standard with the current application in order to affirm the earlier variance approval and to make its period of approval concurrent with the approval period for the current Site Development Review application. The following findings relative to the variance approval criteria (Code Section 18.134.050) are essentially the same as previously adopted by the Planning Commission and City Council with regard to the earlier application affecting this site.

Special circumstances exist which are peculiar to this site and proposal. The applicant proposes to construct this project in two phases: the first phase consists of construction of the new building on the southwestern portion of the property. The existing building would then be demolished. The applicant hopes to attract a complimentary [sic] business(es) to build on the northern portion of the lot as part of Phase 2. Should additional parking be found to be necessary in the future, the applicant suggests that a shared parking arrangement could be worked out with the adjacent structure.

The applicant points out that the A-Boy store does not attract "browser or window shoppers",

in that the business constitutes a retail/wholesale type of business which sells bulky merchandise. The latter fact results in the attraction of customers who decide in advance of travel that a product is needed and who travel to a specific destination to obtain that product. The applicant has stated that the existing store rarely has more than six or eight vehicles at any one time. The Commission notes that employees of the business will also require parking spaces and perhaps delivery trucks will need to park and unload on the property; however, it is clear that the existing store use should not need 44 parking spaces. The City agrees that the present use is similar to a "general retail sales, bulky merchandise" use. If the City were to employ the parking standard used for retail sales businesses which sell bulky merchandise, namely 1 space for every 1000 square feet of gross floor area but not less than 10 spaces, it is clear that the proposed 39 spaces are well within City parking requirements.

Although the use of the building may later change, alternatives are available in conjunction with the future phase of construction on this property. If a new use, which has a higher parking demand, occupies the building, a new site development review and evaluation of parking would be required. The issue of parking space numbers will also be evaluated as part of the site development review for phase two of this development. The use will be the same as permitted by City regulations and existing physical and natural systems will not be affected by this proposal. Therefore, the Commission finds that the variance related to parking is justified.

Other parking standards. The Code requires one secure bicycle parking space for every 15 required automobile spaces. In this case a minimum of three bicycle parking spaces are needed. The site plan indicates a proposed location for a 3 space bike rack. This standard is therefore satisfied.

The site plan does not provide for an appropriate number of designated handicapped parking spaces as required by the Oregon Revised Statutes (2 required; 1 proposed), although the 1 space proposed would satisfy City of Tigard Community Development Code standards as currently written. The site plan will therefore need to be revised to add one additional designated handicapped parking space. The Community Development Code will need to be revised to reflect this more stringent standard that took effect on September 1, 1990.

Code Section 18.106.020.M requires parking lot landscaping in accordance with the requirements of Chapter 18.100. That chapter requires the provision of trees in the area of a parking lot at a minimum ratio of 1 tree per 7 parking spaces. The site plan proposes 7 trees in landscaped islands within and adjacent to the 39 space parking lot. This standard is therefore satisfied.

Code Section 18.106.080.A requires at least one off-street loading space for commercial uses having more than 10,000 square feet of floor area. The site plan proposes a loading area on the south side of the proposed building. This standard is therefore satisfied. However, the loading space will need to be provided with

adequate screening from views from neighboring parcels as has previously bee described.

Chapter 18.108: Access, Egress and Circulation

Code Section 18.108.40.C requires that vehicular access be provided to commercial and industrial uses within 50 feet of the primary ground floor entrances to the building. The proposed parking lot is immediately adjacent to the proposed building entrance. Code Section 18.108.50.A requires walkways connecting ground floor entrances of commercial buildings with adjacent public streets. The site plan proposes a sidewalk along the front of the building connecting to the public sidewalk along Main Street. Code Section 18.108.80.A requires a minimum of one 24-foot wide access driveway to a parking lot of this size serving a commercial use. One 36-foot wide driveway would connect the proposed parking lot with Main Street. The proposed access and circulation pattern should provide adequate and safe access for the proposed use. Therefore, the Code's requirements for access and circulation have been satisfied.

Chapter 18.114: Signs

The applicant has proposed no new signage in conjunction with this application. The existing free standing sign will apparently be removed. All new wall and free standing signs must be reviewed by the Planning Division prior to their erection for conformity with the City Sign Code.

The two billboard signs and roof sign are in direct conflict with Code Section 18.120.180,

which requires that the approval of a Site Development Review be conditioned on the proposal's ability to comply with all other applicable provisions of the Code, including sign regulations of Chapter 18.114. Code Section 18.114.070.H prohibits roof signs of all types. Code Section 18.114.090.A.1.a.i.1 permits billboards in certain zoning districts only; the CBD zone is not one of the listed zones. The prior Commission and City Council reviews affecting this site have determined that the billboards and the sign atop the existing A-Boy building are nonconforming signs that have gone beyond the 10-year amortization period adopted by the City Council in 1978 and thus were required to be removed.

Consideration of sign variance. The applicant has requested a variance to the roof sign prohibition of Section 18.114.070.H. The applicant requests that the City not require removal of a sign above the roof line of an existing building on the site as a condition of approval of the current development application. The applicant characterizes the sign as a wall sign built on a parapet wall. The City Council and Planning Commission previously considered the sign and determined that the sign was a roof sign. The applicant has not submitted a variance justification statement specifically addressing the sign situation, nor has the applicant submitted any evidence related to why the sign on the existing building is not a roof sign. The previously quoted justification statement submitted by the applicant (page 12 of this report) is all that was submitted in response to the staff notifying the applicant that the application was incomplete without a statement of reasons supporting the variance

requests. Since the applicant's Statement of Justification is clearly addressing the pathway dedication and construction issues only, and since the Commission is unaware of any other reasons in support of the requested variance to the prohibition on roof signs, the Commission has no alternative but to concur with the Commission and Council's earlier determination that the sign on the existing building is a roof sign and that it must be removed within 45 days of the occupancy of the new building.

No variance request has been received with regard to the billboard signs needing to be removed as was required by the earlier development application decisions affecting this site. The applicant apparently does not contest removal of the billboard signs as a condition of development approval. Compliance with all requirements of the Community Development Code as required by Section 18.120.180 would entail complete removal of these signs prior to occupancy of the building proposed as phase one of the redevelopment of the site.

Chapter 18.120: Site Development Review

Code Section 18.120.180.A.8 requires that where landfill and/or development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/bicycle plan. This order has already dealt with the question of dedication of area outside the floodplain for pathway construction and the construction of the pathway as it relates to the provisions of the Action Area overlay

zone. At this point, the report will consider the applicant's request from the requirement to dedicate portions of the site within the 100-year floodplain of Fanno Creek for storm water management purposes. The applicant's *Statement of Justification for Variance* (page 14 of this report) does not directly address storm water drainage concerns but instead provides the general statements listed above as comments intended to apply to all of the variance requests.

The Commission does not find that the requirements for dedication of the area within the floodplain of Fanno Creek for storm water management and greenway purposes constitutes a taking of the applicant's property. Instead, the Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, the Commission finds that the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site.

The Planning Commission finds that the requested variance would conflict with many Plan and Code purposes and policies and therefore is not with the first of the variance approval criteria. As already noted, the Code at Section 18.120.080.A.8 and many other related sections (e.g., Section 18.84.040.A.7) require dedication of floodplain areas, not only for construction of pathways, but primarily to allow for public management of the storm water drainage system. These Code sections implement Comprehensive Plan Policy 3.2.4 which requires dedication of all undeveloped land within the 100-year floodplain. Volume Two of the Plan at Section 3.2 discusses the City's objectives in regulating development within and adjacent to floodplain areas to avoid hazards to the public and to downstream properties. Volume One of the Comprehensive Plan at pages 192 and 193 provides a discussion of the reasons for development of a coordinated City-wide storm water management system. Volume One of the Plan also cites the *Master Drainage Plan* for the City produced by CH2M Hill Inc. in 1981 for a further discussion of the need for public management of the storm water drainage system and for measures intended to increase the flow efficiency of Fanno Creek and other drainage channels in the city.

As noted by the Engineering Division, the *Master Drainage Plan* recommends improvements to the Fanno Creek channel downstream from the Main Street bridge. Proposed channel improvements would include channel widening and slope stabilization. These improvements would move the location of the top of bank approximately five feet closer to the proposed building

than the location of the existing top of bank. In order to accomplish these public improvements related to increasing the flow efficiency of Fanno Creek, dedication of the area of the subject site within the 100-year floodplain and also the adjacent five feet is imperative. Not requiring dedication of this area as a condition of development approval, as the applicant's variance proposal requests, would clearly conflict with purposes and policies of the Comprehensive Plan, Community Development Code, and the City's *Master Drainage Plan*.

The Commission fails to find special circumstances that exist which are peculiar to this site over which the applicant has no control that relate to the variance request. The applicant states that the inability to develop the proposed building without invading the City's intended pathway area is a special circumstance dictating the need for a variance. The Commission does not see how this statement relates to any difficulties involved in the applicant's ability to dedicate area within the 100-year floodplain of Fanno Creek. The applicant's statement refers only to land outside of the 100-year floodplain. The request therefore fails to satisfy the second of the variance approval criteria.

The requested variance to omit floodplain dedication would not affect possible uses permitted by the Code for this property. Dedication of the portion of the property within the 100-year floodplain of Fanno Creek would not be expected to diminish the usability or value of the property because the 100-year floodplain area is virtually unusable due to the year-round water flow of the Creek within a well defined

narrow channel. The applicant has not addressed how City standards (i.e., management of the interconnected storm water drainage system) can be accomplished if the variance request is approved and an important piece of the Fanno Creek stream channel is not available for public improvements to expand the channel as called for by the City's *Master Drainage Plan*. Again, the applicant fails to meet the burden of proof relative to the variance criteria. The third variance approval criterion is not satisfied.

If the area within the 100-year floodplain is not dedicated as the variance application requests, the existing storm water drainage system would be affected because additional stormwater runoff resulting from additional development, both from the subject site and elsewhere within the Fanno Creek drainage basin, is expected to increase flow within the creek and a rise in the 100-year flood elevation without the public's ability to make channel modifications in this area to offset the increase in stream flow. If dedication is required as specified by the Code, the channel of Fanno Creek in this area could be improved by public agencies as called for by the *Master Drainage Plan*. These channel improvements, here and elsewhere along the creek, would be expected to improve the channel's ability to transmit stormwater flows thereby reducing the 100-year flood elevation and reducing the possibility of floodwater damages and threats to public safety. Because the requested variance would therefore have an adverse effect upon an important physical system, the request is not consistent with the fourth variance approval criterion.

The Planning Commission finds that the applicant has failed to state what hardship would exist related to the requirement for floodplain dedication since this floodplain area is not buildable land under the City's regulations because the land in question within the floodplain is primarily the actual stream channel of Fanno Creek. Therefore, the Commission is unable to find that the applicant's request would be the minimum variance which would relieve an uncertain hardship. The fifth variance approval criterion is therefore not met.

The applicant's request for a variance from the floodplain dedication requirement of Community Development Code Section 18.120.080.A.8 is not supported by adequate documentation addressing the variance approval criteria. The variance request is therefore denied.

Additionally, the Engineering Division has noted that an adjustment of the proposed building's location will need to be made in order to accommodate the pathway and the future City initiated relocation of the floodplain bank as well as to avoid conflicts with existing sewers passing through the site. This should be accomplished on a revised site plan that will need to be largely consistent with the site plan and landscaping plans that have been reviewed or else a new Site Development Review application will be necessary. The Commission calls to the applicant's attention the provisions of Code Sections 18.120.070 and .080 which limit the degree of modification from an approved site plan that may be reviewed by the director without a new application becoming necessary.

Master Plan for Fanno Creek Park

Fanno Creek Park is a community park located along Fanno Creek between Main Street and SW Hall Boulevard in the Central Business District. The site lies within the 100-year floodplain and immediately abuts the subject property along its southwestern property line. It is hoped that the entire park will eventually contain 35 acres. The dedication of the land area within the 100-year floodplain and the eventual construction of a pathway in that area on the subject property is consistent with the City's park plans for the area.

In the City's Master Plan for Fanno Creek Park, it is stated that Fanno Creek Park is intended to become the focal point for community, cultural, civic and recreational activities. A paved urban plaza, an amphitheater, an English water garden, pathways, a tea house, a man-made enlargement of the existing pond, as well as preserved natural areas are all components foreseen for this area.

The proposed development presently under review will abut this planned community park, and at its closest point, would be no more than eight feet from the outer boundary of the 100-year floodplain. The Engineering Division has stated that the proposed structure should be at least 10 feet away from the relocated outer bank in order to accommodate an eight foot wide pathway and the planned reconstruction of the storm drainage channel along the flood plain. This indicates that an adjustment to the placement of the building on the site will be necessary in order to adequately accommodate the

path and vegetative screening up to the relocated bank of the storm drainage channel.

VI. CONCLUSION AND RECOMMENDATION

The Planning Commission concludes that the proposed development, with modifications, will promote the general welfare of the City and will not be significantly detrimental nor injurious to surrounding land uses, provided development that occurs complies with applicable local state and federal laws. To that end, the Commission unanimously upholds the May 24, 1991 decision of the Community Development Director's designee approving Site Development Review SDR 91-0005 and a Variance allowing 39 parking spaces to suffice whereas 44 parking spaces would normally be required for a general retail use. The Commission also unanimously upholds the denial of the remainder of Variance VAR 91-0010 upon finding that the applicant failed to show that the Variance request satisfied the variance approval criteria.

The Commission's approval of SDR 91-0005 is subject to the following conditions of approval:

UNLESS OTHERWISE NOTED, THE FOLLOWING CONDITIONS SHALL BE MET PRIOR TO ISSUANCE OF BUILDING PERMITS:

1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to

intrude into the greenway area. STAFF CONTACT: Chris Davies, Engineering Division.*

2. The applicant shall obtain written approval from Unified Sewerage Agency of Washington County for connection to the Unified Sewerage Agency trunk line prior to issuance of aPpblic [sic] improvement permit. A copy of the permit shall be submitted to the City of Tigard Engineering Department.
STAFF CONTACT: Greg Berry, Engineering Division.

3. The applicant shall submit a revised site plan showing: 1) building plans which show the proposed design and location of outdoor lighting and rooftop mechanical equipment; 2) the location and screening of the trash disposal area; 3) the relocation of the phase one building outside of the greenway area and out of conflict with existing sanitary sewer easements; and 4) a minimum of two appropriately located designated handicapped accessible parking spaces. STAFF CONTACT: Jerry Offer, Planning Division.

4. The applicant shall submit a revised landscaping plan showing: 1) screening for the trash disposal area; and 2) the installation

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* This condition has been amended per Council action on September 10, 1991. The following sentence was removed: "A monumented boundary survey showing all new title lines, prepared by a registered professional land surveyor, shall be submitted to the City for review and approval prior to recording."

of street trees along the Main Street frontage of the site to the east of the proposed driveway. For purposes of calculating the required landscaped area (15%), the dedicated land noted in Condition No. 1. above may be included. The City shall be responsible for landscaping the land dedicated to the public. STAFF CONTACT: Ron Bunch, Planning Division.

5. The City Engineering Division shall locate and clearly mark the 100-year floodplain boundary prior to commencement of construction. Floodplain boundary markers shall be maintained throughout the period of construction. STAFF CONTACT: Chris Davies, Engineering Division.

6. A demolition permit shall be obtained prior to demolition or removal of any structures on the site. The applicant shall notify Northwest Natural Gas prior to demolition. STAFF CONTACT: Brad Roast, Building Division.

7. The applicant shall install an 8-foot tall solid plywood fence behind the sidewalk/public right-of-way along SW Main Street (from the southwestern property line to a minimum of 20 feet beyond the new building to the northeast) prior to start of construction and must remain until all construction is complete (Uniform Building Code section 4407(c). STAFF CONTACT: Brad Roast, Building Division.

8. As part of the improvement plans the applicant shall submit details and calculations that show the change in the amount of impervious surface area created by this

development. In addition, the fee-in-lieu for water quality shall be paid. STAFF CONTACT: Chris Davies, Engineering Division.

9. An erosion control plan shall be provided as part of the improvement drawings. The plan shall conform to "Erosion Control Plans – Technical Guidance Handbook, November 1989."

10. The applicant shall submit evidence that the proposed building does not encroach upon the sanitary sewer easements that cross the parcel or, alternately, submit evidence that the Unified Sewerage Agency does not object to any proposed encroachment. STAFF CONTACT: Chris Davies, Engineering Division.

UNLESS OTHERWISE NOTED, THE FOLLOWING CONDITIONS SHALL BE SATISFIED PRIOR TO ISSUANCE OF AN OCCUPANCY PERMIT:

11. All landscaping materials and other proposed site improvements noted in Conditions 3. and 4 shall be installed or financially assured prior to occupancy of any structure. STAFF CONTACT: Jerry Offer, Planning Division.

12. All new signage must receive approval by the Planning Division prior to being erected. STAFF CONTACT: Ron Pomeroy, Planning Division.

13. The two nonconforming, amortized billboard signs and support structures shall be completely removed from the property prior to occupancy of phase one of this

development OR the applicant shall submit any applicable legal document which prohibits their removal. STAFF CONTACT: Ron Pomeroy, Planning Division.

14. As a condition of the occupancy permit, the applicant shall be required to replace any portions of the existing sidewalk along Main Street which are damaged or in poor repair and to reconstruct any existing curb cuts which are being abandoned. Prior to any work being started within the public Right-of-Way the applicant shall obtain a Street Opening permit from the Engineering Department. STAFF CONTACT: Chris Davies, Engineering Division.

15. The existing roof sign shall be permanently removed from the subject property within 45 days of the issuance of the Occupancy Permit for the new building. STAFF CONTACT: Ron Pomeroy, Planning Division.

THIS APPROVAL SHALL BE VALID FOR EIGHTEEN (18) MONTHS FROM THE DATE OF THE FINAL DECISION.

The Planning Commission's decision eliminates condition of approval #9 of the Director's designee's decision. That condition stated that a Traffic Impact Fee was required to be paid upon issuance of a building permit for the proposed building on the site. While the Commission does not find that this statement regarding the Traffic Impact Fee needs to be a condition of approval of the application,

this action does not relieve the applicant of the responsibility of compliance with Washington County Ordinance 379 related to the county-wide Traffic Impact Fee program.

It is further ordered that the applicant be notified of the entry of this order.

PASSED: This 15 day of July, 1991, by the Planning Commission of the City of Tigard.

/s/ Milt Fyre
Milt Fyre, President
Tigard Planning Commission

APPENDIX H

Chapter 197

Comprehensive Land Use Planning Coordination

1991 OREGON REVISED STATUTES

197.010 Policy. The Legislative Assembly declares that, in order to assure the highest possible level of liveability in Oregon, it is necessary to provide for properly prepared and coordinated comprehensive plans for cities and counties, regional areas and the state as a whole. These comprehensive plans:

(1) Must be adopted by the appropriate governing body at the local and state levels;

(2) Are expressions of public policy in the form of policy statements, generalized maps and standards and guidelines;

(3) Shall be the basis for more specific rules and land use regulations which implement the policies expressed through the comprehensive plans;

(4) Shall be prepared to assure that all public actions are consistent and coordinated with the policies expressed through the comprehensive plans; and

(5) Shall be regularly reviewed and, if necessary, amended to keep them consistent with the changing needs and desires of the public they are designed to serve. [1973 c.80 § 2; 1981 c.748 § 21a]

197.175 Cities and counties planning responsibilities; rules on incorporations; compliance with goals. (1) Cities and counties shall exercise their planning and zoning responsibilities, including, but not limited to, a city or special district boundary change which shall mean the annexation of unincorporated territory by a city, the incorporation of a new city and the formation or change of organization of or annexation to any special district authorized by ORS 198.705 to 198.955, 199.410 to 199.519 or 451.010 to 451.600, in accordance with ORS chapters 196 and 197 and the goals approved under ORS chapters 196 and 197. The commission shall adopt rules clarifying how the goals apply to the incorporation of a new city. Notwithstanding the provisions of section 15, chapter 827, Oregon Laws 1983, the rules shall take effect upon adoption by the commission. The applicability of rules promulgated under this section to the incorporation of cities prior to August 9, 1983, shall be determined under the laws of this state.

(2) Pursuant to ORS chapters 196 and 197, each city and county in this state shall:

(a) Prepare, adopt, amend and revise comprehensive plans in compliance with goals approved by the commission;

(b) Enact land use regulations to implement their comprehensive plans;

(c) If its comprehensive plan and land use regulations have not been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the goals; and

(d) If its comprehensive plan and land use regulations have been acknowledged by the commission, make land use decisions and limited land use decisions in compliance with the acknowledged plan and land use regulations.

(3) Notwithstanding subsection (1) of this section, the commission shall not initiate by its own action any annexation of unincorporated territory pursuant to ORS 222.111 to 222.750 or formation of and annexation of territory to any district authorized by ORS 198.010 to 198.430 and 198.510 to 198.915 or 451.010 to 451.600. [1973 c.80 §§ 17, 18; 1977 c.664 § 12; 1981 c.748 § 15; 1983 c.827 § 3; 1989 c.761 § 18; 1991 c.817 § 21]

APPENDIX I

OREGON ADMINISTRATIVE RULES

OAR 660-15-000(5)

5. OPEN SPACES, SCENIC AND HISTORIC AREAS, AND NATURAL RESOURCES

GOAL

To conserve open space and protect natural and scenic resources.

Programs shall be provided that will

(1) insure open space.

(2) protect scenic and historic areas and natural resources for future generations, and

(3) promote healthy and visually attractive environments in harmony with the natural landscape character. The location, quality and quantity of the following resources shall be inventoried:

a. Land needed or desirable for open space;

b. Mineral and aggregate resources;

c. Energy sources;

d. Fish and wildlife areas and habitats;

e. Ecologically and scientifically significant natural areas, including desert areas;

f. Outstanding scenic views and sites;

g. Water areas, wetlands, watersheds and groundwater resources;

h. Wilderness areas;

i. Historic areas, sites, structures and objects;

j. Cultural areas;

k. Potential and approved Oregon recreation trails;

l. Potential and approved federal wild and scenic waterways and state scenic waterways.

Where no conflicting uses for such resources have been identified, such resources shall be managed so as to preserve their original character. Where conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal.

Cultural Area – refers to an area characterized by evidence of an ethnic, religious or social group with distinctive traits, beliefs and social forms.

Historic Areas – are lands with sites, structures and objects that have local, regional, statewide or national historical significance.

Natural Area – includes land and water that has substantially retained its natural character and land and water that, although altered in character, is important as habitats for plan, animal or marine life, for the study of its natural historical, scientific or palcontological features, or for the appreciation of its natural features.

Open Space – consists of lands used for agricultural or forest uses, and any land area that would, if preserved and continued in its present use:

(a) Conserve and enhance natural or scenic resources;

(b) Protect air or streams or water supply;

(c) Promote conservation of soils, wetlands, beaches or tidal marshes;

(d) Conserve landscaped areas, such as public or private golf courses, that reduce air pollution and enhance the value of abutting or neighboring property;

(e) Enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries or other open space;

(f) Enhance recreation opportunities;

(g) Preserve historic sites;

(h) Promote orderly urban development.

Scenic Areas – are lands that are valued for their aesthetic appearance.

Wilderness Areas – are areas where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. It is an area of undeveloped land retaining its primeval character and influence, without permanent improvement or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) may also contain ecological, geological, or other features or scientific, educational, scenic, or historic value.

OAR 660-15-000(12)

12. TRANSPORTATION

GOAL

To provide and encourage a safe, convenient and economic transportation system.

A transportation plan shall (1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian; (2) be based upon an inventory of local, regional and state transportation needs; (3) consider the differences in social consequences that would result from utilizing differing combinations of transportation modes; (4) avoid principal reliance upon any one mode of transportation; (5) minimize adverse social, economic and environmental impacts and costs; (6) conserve energy; (7) meet the needs of the transportation disadvantaged by improving transportation services; (8) facilitate the flow of goods and services so as to strengthen the local and regional economy; and (9) conform with local and regional comprehensive land use plans. Each plan shall include a provision for transportation as a key facility.

Transportation – refers to the movement of people and goods.

Transportation Facility – refers to any physical facility that moves or assists in the movement of people and goods excluding electricity, sewage and water.

Transportation System – refers to one or more transportation facilities that are planned, developed, operated and maintained in a coordinated manner to supply continuity

of movement between modes, and within and between geographic and jurisdictional areas.

Mass Transit – refers to any form of passenger transportation which carries members of the public on a regular and continuing basis.

Transportation Disadvantage – refers to those individuals who have difficulty in obtaining transportation because of their age, income, physical or mental disability.

APPENDIX J

TIGARD
COMPREHENSIVE PLAN

VOLUME TWO
FINDINGS, POLICIES AND IMPLEMENTATION STRATEGIES

October, 1982
Revised February, 1983
Revised November, 1983
Revised December, 1987

. . . .

3. NATURAL FEATURES AND OPEN SPACE

. . . .

3.2 FLOODPLAINS

FINDINGS

- The objective of the City is to use the detailed information gathered on floodplains from the U.S. Army Corps of Engineers, and develop policies to:

. . . .

3. Emphasize the retention of a vegetative buffer along streams and drainageways, to reduce runoff and flood damage and provide erosion and siltation control.

. . . .

POLICIES

. . . .

3.2.4 THE CITY SHALL REQUIRE THE DEDICATION OF ALL UNDEVELOPED LAND WITHIN THE 100-YEAR FLOODPLAIN PLUS SUFFICIENT

OPEN LAND FOR GREENWAY PURPOSES SPECIFICALLY IDENTIFIED FOR RECREATION WITHIN THE PLAN.

. . . .

3.5 PARKS, RECREATION AND OPEN SPACE

. . . .

POLICIES

. . . .

3.5.3 THE CITY HAS DESIGNATED THE 100-YEAR FLOODPLAIN OF FANNO CREEK, ITS TRIBUTARIES, AND THE TUALATIN RIVER AS GREENWAY, WHICH WILL BE THE BACKBONE OF THE OPEN SPACE SYSTEM. WHERE LANDFILL AND/OR DEVELOPMENT ARE ALLOWED WITHIN OR ADJACENT TO THE 100-YEAR FLOODPLAIN, THE CITY SHALL REQUIRE THE DEDICATION OF SUFFICIENT OPEN LAND AREA FOR GREENWAY ADJOINING AND WITHIN THE FLOODPLAIN.

. . . .

8. TRANSPORTATION

. . . .

8.4 PEDESTRIAN AND BICYCLE WAYS

. . . .

IMPLEMENTATION STRATEGIES

1. The City shall review each development request adjacent to areas proposed for pedestrian/bike pathways to ensure that the adopted plan is properly implemented, and require the necessary easement or dedications for the pedestrian/bicycle pathways.

APPENDIX K

TIGARD
COMMUNITY DEVELOPMENT CODE

TITLE 18

ZONING

. . . .

Chapter 18.120

SITE DEVELOPMENT REVIEW

. . . .

18.120.180 Approval Standards

A. The Director shall make a finding with respect to each of the following criteria when approving, approving with conditions, or denying an application.

. . . .

8. Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.

Supreme Court, U.S.
FILED
NOV 4 1993
OFFICE OF THE CLERK

No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Petition For Writ Of Certiorari To The Oregon Supreme Court

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Where uncontradicted and uncontested evidence before the City in a hearing for commercial development approval demonstrates that the development will have a direct impact on the transportation and storm drainage system, and the City finds that a condition of development approval requiring dedication of land for use in those public systems is required by city law and is reasonably related to those impacts, did the conditional development approval (in lieu of denial for failure to meet city standards) violate the Takings Clause of the Fifth Amendment of the United States Constitution?

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Respondent City of Tigard respectfully requests that this Court deny the Petition For Writ of Certiorari (Petition) of Florence Dolan (Petitioner) seeking review of the decision of the Oregon Supreme Court in this case. That decision is consistent with the decisions of this Court and other lower courts. The Petition does not establish the existence of a conflict among lower court decisions requiring action by this Court. The Petition contains misstatements of material fact and misrepresents the nature and procedural posture of this case. While the issue presented is important, the Petition has not established that consideration of this case is warranted.

I. STATEMENT OF THE CASE

Respondent City of Tigard (Respondent or City) presents the following Statement of the Case to supplement that presented by Petitioner. Petitioner's statement contains misstatements of fact which bear directly on the determination this Court must make in disposing of this Petition. In addition, this Court must be presented with a complete picture of the procedural framework within which land use decisions are made and reviewed in the State of Oregon.

Petitioner's failure to exhaust available remedies in the state review system precludes the bringing to this Court of all but the single issue presented by Respondent in its restated Question for Review. The case as presented in the Petition at best demonstrates a misunderstanding of the Oregon land use system and at worst is an effort by Petitioner to seek review of issues which have been waived through the state review process.

A. City Decision, City Law

Petitioner had burden to show compliance with city standards. City law required dedication of property. Petitioner presented no evidence on issue of development impacts. Only evidence in city record supports findings on impacts.

Petitioner seeks review of the decision of the Oregon Supreme Court to affirm the decisions of the Oregon Court of Appeals and the Oregon Land Use Board of Appeals (LUBA) in which each rejected all of Petitioner's assignments of error related to the City's decision to grant conditional site development approval to an application for a major modification of an existing commercial development.[1,2]

Site development review is applicable to all major modifications of existing developments.[3] A modification to an existing development which increases the intensity of use through creation of more parking spaces or construction of a larger building is a major modification.[4] It has not been disputed by Petitioner that the proposed development will create the impacts found by the City

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[1] The actual Assignments of Error presented to LUBA and the Oregon Court of Appeals are reproduced as Appendix "A".

[2] The project description and background can be found at Petition, D-3, 4; G-6 through G-11.

[3] Tigard, OR., Community Development Code tit. 18, ch. 120, Section 020A (1990). Tigard Community Development Code sections are cited in the following format: CDC § 18.xxx.xxx. The text of CDC § 18.120.020A is reproduced in its entirety in Appendix "B", B-1.

[4] CDC § 18.120.070, reproduced at Appendix "B", B-2 through B-4.

and is properly classified as a major modification to their existing development.

The first phase of the proposed expansion will double the size of the existing commercial structure, and includes a 39 stall parking lot, with a later second phase to further increase the intensity of development on the site. The City Council made specific findings addressing the impacts of the proposed development and the relationship between those impacts and the required dedication of land for greenway, storm drainage, and pedestrian/bicycle path purposes.[5] The Council found that there would be an increase in traffic to and from the site due to the increase in intensity of the commercial operation, and that the increase in traffic would have an impact on the City's multi-model transportation system. The Council further found that the proposed development would increase the area of impervious surface on this site resulting in increased stormwater run off into the Fanno Creek drainage system.

Petitioner's application was evaluated in a hearing process that is similar to an administrative law "contested case" hearing. The City is the decision-make and not a party to the proceeding. Petitioner, who was represented by legal counsel during the two separate evidentiary proceedings before the City, presented no evidence on the issue of impacts. In order for the City to approve a site development review application, it must conclude that all

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[5] The relevant findings of the City were quoted in the Oregon Supreme Court Opinion, reproduced at Petition, A-5 through A-8; the full findings document reproduced as Appendix "G" of the Petition.

applicable city standards have been satisfied. CDC § 18.32.250A,E; CDC § 18.120.180.[6] It was the burden of the Petitioner to establish that all city standards were met. CDC § 18.32.250A.[7] The relevant approval standard reads:

> "8. Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." CDC § 18.120.180 A.8.

Petitioner's failure to meet her burden of proof resulted in the conditioning of the approval in lieu of denial. The City has the authority to grant a site development review approval upon compliance with conditions designed to insure conformance of the application with city standards. CDC § 18.32.250E.1.[8] Without the attachment of the condition, the City would have been forced to deny the application for failure to meet all applicable standards. The condition which gives rise to Petitioner's challenge reads:

> "1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain (i.e.,

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[6] Text reproduced at Appendix "B", B-14 through B-18; B-4 through B-14.

[7] Text reproduced at Appendix "B", B-14.

[8] Text reproduced at Appendix "B", B-16.

> all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area. STAFF CONTACT: Chris Davies, Engineering Division." Petition, G-43,44.

This condition was made a part of the approval because the site development review documents submitted by Petitioner did not show dedication of this property. The condition does not result in any change in the size or scope of Petitioner's proposed expansion. The land in the floodplain, which could not be developed due to other city regulations, is counted toward meeting the landscaping requirement for the project. Petition, G-28 through G-30; G-44,45.

LUBA found that the City had adopted a comprehensive master drainage plan providing for the use of the Fanno Creek greenway in the management of storm water runoff. Petition, D-16. The specific findings on storm drainage dedication requirements are found in the Petition, G-36 through G-41. The dedication requirement for storm drainage purposes is predicated upon the conclusions of the City's master drainage plan and the policy sections of the City's comprehensive plan regarding the cumulative impacts of development on the drainage system.

B. Oregon Framework for Review of City Land Use Decisions

Courts are bound by local finding supported by substantial evidence in the whole record. Petitioner must present all issues at LUBA, or they are waived.

The framework for review of local land use decisions in Oregon is fixed by the provisions of Oregon Revised Statutes (ORS) Chapter 197. These statutes require considerable judicial deference to factual determinations made by cities as a part of a land use application review process. To the extent that a necessary factual justification is relevant in this proceeding, Oregon state law limits direct judicial review of that justification. That restraint exists for constitutional factual questions as well as any other factual question. *See*, e.g. *Younger v. City of Portland*, 752 P.2d 262 (Or. 1988).

LUBA is the initial body to review a local government land use decision and has exclusive jurisdiction over such decisions. ORS 197.825(1).[9] LUBA could have reversed or remanded this city decision on a factual issue only if the decision was not supported by substantial evidence in the whole record. ORS 197.828(2)(a); 197.835(7)(a)(C).[10] Factual findings made by a local government are presumed to be true if supported by substantial evidence in the record, even if a reviewing court would draw a different conclusion from the same evidence. *Younger v. City of Portland*, 752 P.2d at 270. Constitutional questions of factual relationships are no

[9] Text reproduced at Appendix "C", C-1.

[10] Text reproduced at Appendix "C", C-2; C-5.

different. The City's factual determination on public service needs generated by a proposed development are binding if supported by substantial evidence in the whole record. ORS 197.830(13)(b).[11]

When there are disputed allegations of unconstitutionality of a land use decision, LUBA is allowed to take evidence and make findings of fact on those disputed allegations. ORS 197.830(13)(b).[12] The evidentiary hearing before LUBA can establish factual issues about an alleged taking of property without just compensation not shown in the local government record. *Dunn v. City of Redmond*, 735 P.2d 609 (Or. 1987). Petitioner did not request an evidentiary hearing before LUBA in this case, a critical fact omitted in the Petition.

It is the policy of the Oregon land use system that land use decisions implementing plans and standards are to be made at the local level consistent with statewide planning goals. ORS 197.005(3).[13] A party will not be able to raise an issue in the appeal process if that issue was not first raised at the local level. ORS 197.835(2).[14]

[11] Text reproduced at Appendix "C", C-11.

[12] Text reproduced at Appendix "C", C-11.

[13] Text reproduced at Appendix "C", C-13.

[14] Text reproduced at Appendix "C", C-3,4.

C. Issues Not Contested by Petitioner in State Review System

Petitioner did not challenge city findings on impacts or evidentiary support for findings. Petitioner did not challenge city standards, the existence of a "nexus" between standards and condition, nor economic impact of condition. No due process challenge to Oregon land use system made.

In order for LUBA, the Oregon Court of Appeals or the Oregon Supreme Court to consider an issue, that issue must be assigned as error at each step in the proceedings. *Mullenaux v. Oregon Dept. of Rev.*, 651 P.2d 724 (Or. 1982); ORAP 5.45, 4.60, 4.05.[15] With regard to the issues raised before LUBA in this case, the Board found:

> "Petitioners generally argue under these assignments of error that the proposed development is 'in no way related to' or 'not related to' the challenged dedication requirement. [LUBA] Petition for Review 11, 14. *However, petitioners do not challenge the adequacy of the above quoted findings or their evidentiary support in the record.* Therefore, for purposes of evaluating petitioners' constitutional taking claims, we assume that the facts found by the city concerning the impacts of the proposed development and the need for storm water management and alternative means of transportation are

[15] Oregon Rules of Appellate Procedure (ORAP), text reproduced at Appendix "D", D-1 through D-3; Petitioner must include sufficient argument to explain assignments of error. Expression of general disagreement with decision is not enough. *Camp v. Josephine Co.*, 23 Or. LUBA 6 (1992).

> valid, and consider only whether these facts are legally sufficient to establish the requisite relationship between the impacts of the proposed development and the exaction imposed." *Dolan v. City of Tigard*, 22 Or. LUBA 617, 622 (1992) (Emphasis added).[16]

In addition LUBA found:

> "Petitioners do not contend that establishing a greenway in the floodplain of Fanno Creek for storm water management purposes, and providing a pedestrian/bicycle pathway system as an alternative means of transportation, are not legitimate public purposes. Further, petitioners do not challenge the sufficiency of the 'nexus' between these *legitimate public purposes* and the *condition* imposed requiring dedication of portions of petitioners' property for the greenway and pedestrian/bicycle pathway. Rather, petitioners' contention is that under both the federal and Oregon Constitutions, the relationships between the *impacts* of the proposed development and the *exactions* imposed are insufficient to justify requiring dedication of petitioners' property without compensation." *Dolan*, 22 Or. LUBA 617, 621 (1992) (Emphasis in original).[17]

It is significant that this analysis of Petitioner's case by LUBA was relied upon by the Oregon Supreme Court in its statement framing the issues presented by Petitioner. Petition, A-7 through A-9.

[16] Petition, D-10.

[17] Petition, D-7,8.

A fair reading of the Petition leaves the impression that Petitioner is asserting an attack on the City's factual findings, and that it would be appropriate at this stage of proceedings for this Court to review those findings. That is simply not the case. Petitioner's opportunity to challenge the findings and evidence occurred at LUBA; she chose not to take advantage of that opportunity.

The Oregon Court of Appeals and the Oregon Supreme Court recognized the limited nature of the issue raised by Petitioner in this matter. Because Petitioner has conceded that her development has a direct impact on the City's transportation and storm drainage system, this Court, like the Oregon Courts, are bound by the City's factual findings.

Just as importantly, Petitioner has *never* contended that the City's regulations relating to storm water management and its transportation system do not fulfill legitimate public purposes. She has never alleged she is not left with an economically viable use of her land after the dedication occurs. Nor has she ever challenged the sufficiency of the connection or "nexus" between these conceded legitimate public purposes and the regulations which required the imposition of the condition. It was the failure of the California Coastal Commission to establish this connection that led to the result in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Because Petitioner conceded these points, those issues were resolved with finality in the state court system.

Petitioner has been represented by legal counsel since the beginning of this case. Petitioner has chosen how to present her case. By not fully presenting her case

she has by-passed the state courts and now asks this Court to render decisions on issues never presented in the state system.

Finally, Petitioner does not now and has never argued that the process provided by the Oregon system is in any way inadequate or unfair. By not presenting a due process challenge to Oregon's land use system, Petitioner has waived her right to raise all but one of the issues presented in this Petition.

D. Oregon Supreme Court Opinion

Oregon Supreme Court identified narrow issue presented. Court correctly explained Nollan holding and why Petitioner's interpretation is wrong. Court found no "per se" taking.

The opinion of the Oregon Supreme Court correctly stated the narrow issue presented by Petitioner through her state appeal.

> "The issue is whether city has demonstrated the required relationship between the conditions that it attached to its approval of petitioner's proposed land use and the expected impacts of that land use. Petitioners argue that, because city failed to demonstrate an 'essential nexus' or a 'substantial relationship' between the exactions demanded by city and the impacts caused by their proposed development, city's exactions constitute a 'taking' under the Fifth Amendment of the federal constitution. City responds that it need only show a 'reasonable relationship' between the imposition of the conditions and the legitimate public interest advanced." *Dolan v. City of Tigard*,

854 P.2d 437, 438 (Or. 1993) (footnotes omitted).[18]

The court, after summarizing the factual posture of the case, focused upon the unchallenged factual findings of the City and quoted those findings at length. The court, recognizing its limited role in the review of local land use decisions, pointed out that:

> "(Petitioners) did not challenge the adequacy of city's above quoted findings or their evidentiary support in the record. Rather, petitioners argued that city's dedication requirements are not related to their proposed development and, therefore, that those requirements constitute an uncompensated taking of their property under the Fifth Amendment." *Dolan*, 854 P. 2d at 440.[19]

The court's opinion follows the law established by this Court by stating that a land use regulation does not effect a "taking" of property, within the meaning of the Fifth Amendment, if it substantially advances a legitimate state interest and does not deny an owner economically viable use of their land. The court supports this statement of the law by citation to *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987) and *Agins v. City of Tiburon*, 447 U.S. 255 (1980). *Dolan*, 854 P.2d at 442.[20]

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[18] Petition, A-2.

[19] Petition, A-7.

[20] The court disposed of Petitioner's "per se" taking argument at footnote 8 by pointing out that such a taking does not occur when the dedication occurs with the owner's permission. The court stated that Petitioner may avoid the physical occupation of her land by withdrawing her application for a development permit. *Dolan*, 854 P.2d at 441 n.8.

In considering the required relationship of the impacts of a development and the exaction, the Oregon Supreme Court concluded that this Court in *Nollan* did not abandon the generally recognized "reasonably related" test and, in fact, noted that its approach was "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts," citing *Nollan*, 483 U.S. at 839. The court concluded that Petitioner is wrong in asserting that *Nollan* changed the law on this point. The court, at footnote 9, construed *Commercial Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992) as providing authority for its interpretation of *Nollan*. *Dolan*, 854 P.2d at 443 n.9.

Further analyzing *Nollan*, the Oregon Supreme Court interpreted that case as requiring that in order for a regulation to *substantially* advance a legitimate state interest, as required by *Agins*, a reasonable relationship must be shown between the exaction or condition of development, and the regulation which furthers the state interest. *Dolan*, 854 P.2d at 443.

For an exaction to be considered "reasonably related" to an impact, it is necessary to show a nexus between the two. *Dolan*, 854 P.2d at 443.[21] The court found in the

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[21] The exaction is reasonably related to an impact if the exaction serves the same purpose that a denial would serve. See *Dept. of Trans. v. Lundberg*, 825 P.2d 641, *cert. denied*, 113 S. Ct. 467 (1992) (sidewalk dedication requirement serves the same legitimate governmental purposes that would justify denying permits to develop commercially zoned properties).

unchallenged factual findings sufficient justification for the dedication. The condition provides additional capacity for the transportation system, and that requirement is reasonably related to the increased traffic congestion that Petitioner admits will result from her development. The court further found that because the development will cover a much larger portion of the site with buildings and parking, thus increasing the site's impervious area, that the requirement for dedication of property for improvement of the storm drainage system is also reasonably related to the conceded increased run off resulting from the intensification of the use.

Petitioner makes much of the sole dissent to the court's opinion. However, the dissent suffers the same flaw as does the Petition. Each focuses on alleged deficiencies in the City's findings of fact, and the evidentiary support for those findings. Petitioner never challenged the factual findings or evidence, thus making them binding on reviewing courts. The dissent is nothing more than a philosophical statement unrelated to the procedural posture of the case, which ignores the fact that Petitioner accepted the City's findings as her own by failing to challenge them.

Perhaps the reason why Petitioner produced no evidence to contradict the City's findings is that no such evidence could be developed. Whatever the reason, it is clear that through the state appeal process Petitioner agreed with the City's findings that her development has a direct impact on the City's transportation and storm water system. She also agreed with the City's conclusion that the dedication requirement is reasonably related to

the extent of impact of the development on the City's systems and that the City requirements serve legitimate public purposes. Petitioner, like the dissenting Justice, fails to accept that the posture of this case cannot be changed.

The Petition improperly leaves the impression that the sufficiency of the City's findings is an issue before this Court. Petitioner's refusal to challenge the findings at the appropriate point in the state process prevents this Court from addressing the issues which she now attempts to raise.

The Oregon Supreme Court correctly recognized the limited issue presented. Petitioner cannot now expand the scope of this case. The court's analysis of the *Nollan* opinion is consistent with that taken by the Ninth Circuit and with this Court's prior opinions on takings issues in the context of the regulation of land development.

II. REASONS FOR DENYING THE PETITION

A. THIS CASE DOES NOT MERIT SUPREME COURT REVIEW; THE CITY'S DECISION SATISFIES THE REQUIREMENTS OF THE TAKINGS CLAUSE

1. Petitioner misstates facts

Petitioner misrepresents posture of case by not informing the Court of issues waived in state proceedings. Petition contains misstatements of fact.

The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and

adequate understanding of the points requiring consideration by the Court in considering a Writ of Certiorari will be a sufficient reason for denying the Petition. Sup. Ct. R. 14.5. The Petition contains the following inaccurate information:

a. Petitioner states that her land use application met "all standards of approval" and that she was singled out to "finance the cost of" public facilities. Petition, "i". Those statements are false. Petitioner's application did not provide for a dedication in the area within the 100-year floodplain of Fanno Creek. That failure resulted in an application which did not meet a city standard for approval. No financial contribution is required by the City's approval.

b. Petitioner states "the city made findings that failed to directly and substantially demonstrate the increased intensity of the Dolans' use required the exactions." Petition, "i". That statement is false. As explained above, Petitioner has accepted the City's findings and conclusions that the development has a direct and substantial impact on the City's systems and that the exaction is reasonably related to the impacts.

c. In the Statement of the Case, Petitioner has omitted the fact that she has accepted the City's factual findings and conclusions. By doing this, she has mislead this Court into believing that the City's factual findings are at issue in this case.

d. Petitioner states "This is an inverse condemnation action." Petition, 4. That statement is not true. This is an administrative action challenging a city land use approval before the Land Use Board of Appeals. The

authority of LUBA is set by statute. LUBA has no authority to require that the city award just compensation to Petitioner for the property interest dedicated. ORS 197.835.

e. Petitioner states "There was, however, no direct, evidentiary linkage between the development of the Dolans' new store and the exacted dedications." Petition, 7. That statement is false. Petitioner has accepted the City's findings which establish a direct linkage between the development and impacts on the City's transportation and storm water management system.

f. In the Statement of the Case, Petitioner blatantly misstates the nature of the case which they presented in the state system. Petition, 7, n. 2. The Oregon Supreme Court found that Petitioner had not challenged the adequacy of the City's findings or their evidentiary support in the record. Petitioner's attempt to qualify that finding is an outright attempt to distort the nature of the case. Petitioner presented no assignment of error to LUBA which challenged the sufficiency of the City's findings nor their evidentiary support. Petitioner did not assign as error in the Oregon Court of Appeals LUBA's conclusion that the City's findings and evidentiary support were not challenged.[22]

g. Petitioner gives the impression that during oral argument before the Oregon Supreme Court, the City admitted that the condition imposed "bore no relationship whatsoever to the scope or intensity of the impacts

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[22] Petitioner's actual Assignments of Error are reproduced at Appendix "A".

of petitioners' proposed use." Petition, 11. That assertion is false. Petitioner does not provide any excerpt from the Supreme Court argument to support her assertion. In any case, a statement by counsel at argument cannot change the facts of the case. The City's unchallenged findings establish impacts and the relationship between the development and the exaction imposed. During oral argument, and in response to a question concerning the impact issue, counsel for the city did point out that this is a major modification to an existing development that, by definition in the City code, has impacts, and that the undisputed facts of the case establish impacts.

What Petitioner does excerpt is a brief and incomplete portion of an exchange between the presiding judge of the panel of the Oregon Court of Appeals and counsel for the City. That exchange focused upon the language of the city code, and *not* the impacts of the proposed development. That brief excerpt is taken totally out of context, does not support the assertion, and has nothing to do with the issue presented in this case.

h. Petitioner states that the City's decision requires construction of a bikepath. Petition, 13, 14. This statement is false. The City's condition requires only the dedication of land and does not require construction of a path.[23]

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[23] The actual condition reads:
"1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area. STAFF CONTACT: Chris Davies, Engineering Division." Petition, G-43.

i. Petitioner's continuing attack on the sufficiency of the City's findings throughout the Petition misleads this Court into thinking that such an attack is possible at this point in this case. It has been thoroughly explained above that Petitioner has accepted the City's factual findings and the evidentiary support for those findings.

The Petition is filled with factual inaccuracies, is misleading concerning the posture of this case, and misstates Petitioner's position at previous stages in this case. These misrepresentations alone constitute sufficient reason for denying the Petition.

2. Oregon Supreme Court Correctly Interpreted And Applied *Nollan* to City Decision

The Court's opinion correctly rejects Petitioner's argument that *Nollan* changed the "reasonable relationship" standard between the impacts of a development and government exaction.

Petitioner asserts, as she has throughout this entire proceeding at the state level, that the *Nollan* opinion changed the law concerning the level of connection, or nexus, that must exist between the impact of a development and an exaction imposed as a condition of a development approval. The Oregon Supreme Court correctly rejected Petitioner's argument. Because Petitioner has accepted the City's factual findings and conclusions regarding the connection between the impact of this

development and the exaction, this case does not present an opportunity to even address Petitioner's issue. Even applying Petitioner's purported test, the uncontested facts support the conclusion that this development has a direct impact on city systems, and that the exaction is constitutional.

The *Nollan* opinion explicitly recognizes that local governments may impose exactions designed to minimize the impact of a single development, or the cumulated impacts of development, including easements allowing rights of access to the public. *Nollan*, 483 U.S. at 836. Such exactions do not violate the Takings Clause when the local government has in place regulations which substantially advance a legitimate state interest, and when the exaction carries out that legitimate interest. Petitioners admit that the City's regulations serve a legitimate state interest. They also admit the exaction substantially advances that legitimate state interest. The *Nollan* opinion provides no support for Petitioner in her quest to challenge the City's decision.

3. No "Per Se" taking

Petitioners voluntary submission to city land use regulations makes the *Loretto* 'per se' taking analysis not applicable.

The holding of the Oregon Supreme Court is consistent with this Court's decision in *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992).

Yee involved the California Mobile Home Residency Law. The Court concluded that the application of that

state regulation to the petitioner's mobile home park did not constitute a physical invasion and thus, did not warrant the heightened scrutiny established by the Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *Yee*, 112 S. Ct. at 1528-31.

Justice O'Connor explained that most of the Court's cases interpreting the Takings Clause of the Fifth Amendment fall within two distinct classes. In the first class are cases where the government requires the property owner to submit to a physical occupation of property. In those, the Takings Clause generally requires compensation. The Court stated that the government effects a physical taking *only* when it *requires* the owner to submit to the physical occupation of land. "This element of required acquiescence is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987). Thus, where the government floods a landowner's property or requires the landowner to accept the forced installation of cable, the Takings Clause requires compensation because the government compelled a physical invasion of the property. *Yee*, 112 S. Ct. at 1528.

In the second class, the government merely regulates the use of property. Compensation is required in these cases only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of economic use of property suggests that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. *See*, e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-125 (1978). The first category of cases (physical or per se takings) require courts to apply a clear rule; the second (regulatory takings) require complex factual

assessments of the purpose and economic affects of government actions. *Yee,* 112 S. Ct. at 1526.

This Court determined that the issue before it in *Yee* involved a regulatory taking question and not a physical occupation question. The critical fact that lead the Court to that conclusion was that the petitioners voluntarily rented their land to mobile homeowners. *Yee,* 112 S. Ct. at 1528. They were not compelled by state law to rent property to tenants. Once they choose to do so, however, they became subject to the law, which imposed severe restrictions on petitioner's ability to change the use of his land or to evict tenants. *Id.* "Put bluntly, no government has required any physical invasion of petitioner's property. Petitioner's tenants were invited by petitioners, not forced upon them by the government." *Yee,* 112 S. Ct. at 1528, *citing to Florida Power,* 480 U.S. at 252-253. The Court reaffirmed its statement from *Loretto,* that the Supreme Court has consistently affirmed the state's broad power to regulate the use of land without paying compensation for all economic injuries that such a regulation entails. *Yee,* 112 S. Ct. at 1529.

In this case, Petitioner has failed to accept the fact that when she submitted a development application to intensify the use of her property, she voluntarily subjected the property to the requirements of the City's land use regulations. The City's authority to regulate the use of land is not an issue in this case. Petitioner will not have to comply with the dedication requirement until she takes advantage of the development approval and intensifies the use of her property.

Petitioner has never argued that the City does not have the authority to deny her development application unless she complies with the City's land use regulations. This Court in *Nollan* made clear that a government can regulate the use of land through the imposition of conditions, including conditions which require the dedication of property to public use, so long as the regulation in question substantially advances a legitimate state interest, and the condition implementing that regulation advances the state interest embodied in the regulation. *Nollan,* 483 U.S. at 835-37.

This Court made clear in *Yee* that the class of cases which properly are categorized as "physical taking" or "physical occupation" cases is limited to only those situations in which unilateral action by the government forces a property owner to submit to the physical invasion of their land. In this case Petitioner is not being forced by the government to do anything. If Petitioner does not intensify the use of her land, the government cannot and will not enforce the requirement that she dedicate property for storm water management and transportation purposes. It is only after Petitioner takes advantage of her development approval, and intensifies the use of her land, that she must comply with the City's regulations and dedicate property to assist in mitigating the impacts of the development.

The Oregon Supreme Court gave Petitioner's "physical occupation" argument little attention. The Oregon Supreme Court correctly interpreted *Yee,* and *Loretto,* and correctly applied those holdings from this Court to the facts of this case.

B. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF OTHER COURTS.

Petitioner claims that the decision of the Oregon Supreme Court directly conflicts with interpretations, by both federal and state courts, of the required nexus between conditions and impacts in light of *Nollan*. Such a claim is unfounded and evidences Petitioner's misunderstanding of the meaning and application of *Nollan*. The Petition illustrates particular confusion about the distinct analyses involved in Takings Clause cases.

Nollan clearly reaffirmed the basic test of *Agins*, "that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'deny an owner economically viable use of his land'." *Nollan*, 483 U.S. at 834, *citing Agins v. Tiburon*, 447 U.S. 255, 260 (1980). At the same time, however, *Nollan* did not impose a more exacting standard on the nexus between such regulation and the impacts of the proposed development. Rather, this Court simply found that the regulation at issue in that case failed to meet even the most lax standard, and noted that its conclusion was consistent with the approach taken by all lower courts aside from the California state courts. *Nollan*, 483 U.S. at 834-35.

Lower court decisions since *Nollan*, including that of the Oregon Supreme Court in this case, illustrate conformity with this approach. In that light, neither this case nor any case cited by Petitioner suggests any basis or need for this Court to address the question presented. Petitioner's references and case summaries, however, consistently illustrate confusion in understanding the distinction between the need to show that the development

condition substantially advances a legitimate state interest and the need to show that the development condition reasonably relates to the impacts of the development.

1. There is no conflict among the federal courts

The case which most clearly illustrates the consistency of lower federal court treatment of this issue is *Commercial Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992). That case considered a challenge to an ordinance conditioning certain commercial development on payment of a low income housing fee.

Responding to the argument that *Nollan* had articulated a higher standard for such development fees, the court stated that it was "not persuaded that *Nollan* materially changes the level of scrutiny" to be applied, since the *Nollan* Court had found that "it did not have to decide how close a 'fit' between the conditions and the burden is required." *Commercial Builders*, 941 F.2d at 874. More striking was the court's declaration that of the other circuits which have considered land use conditions since *Nollan*, "[n]one have interpreted that case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land." *Id.* It is therefore ironic that Petitioner should cite the case as standing for the very proposition which the opinion specifically refutes.

The *Commercial Builders* opinion presents a positive statement by a federal appeals court that lower federal

courts have consistently interpreted *Nollan* as not materially changing the level of scrutiny between impact and exaction in Takings Clause cases. Careful review of those cases cited by Petitioner as evidence of conflict shows nothing to the contrary; rather only Petitioner's fundamental misunderstandings about *Nollan*.

Petitioner's reliance on *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575 (9th Cir. 1991), is misplaced. The case is distinguishable because it is a rent control case, not a dedication case, and the court held that a "*Loretto*" type physical taking occurred. *Id. Loretto* is not applicable to the facts of this case. Further, the opinion compares Takings Clause analysis with Due Process analysis. *Id.* at 583. This Court has never explained its Takings Clause analysis as applicable to those under other provisions of the Federal Constitution. Instead, the *Nollan* opinion specifically discounted such a relation. *Nollan*, 483 U.S. at 834 n. 3 ("[O]ur opinions do not establish that these [regulatory taking] standards are the same as those applied to due process or equal protection claims.")

Petitioner's reference to *Leroy Land Dev. v. Tahoe Regional Planning Agency*, 733 F. Supp. 1399, 1401 (D. Nev. 1990), *rev'd*, 939 F.2d 696 (9th Cir. 1991), is facially inapposite in view of the Ninth Circuit's subsequent reversal on the grounds that the Takings Clause analysis articulated in *Nollan* was inapplicable under the facts of the case. 939 F.2d at 699. Regardless, the reference by Petitioner to the District Court opinion confuses the separate tests involved in Takings Clause analysis. The opinion states that "*Nollan* seems to require a fairly close nexus between the regulatory condition and the underlying governmental purpose." *Leroy Land*, 733 F. Supp. at 1401

(citations omitted). The summary by Petitioner restates this as requiring a "fairly close nexus required between regulatory conditions and burden created by proposed development." Petition, 24. Thus, Petitioner again exhibits fundamental confusion about *Nollan*. The correct analysis for this nexus of development conditions to the state's interest was stated in *Agins*, reaffirmed in *Nollan*, and explicitly followed in this case. Finally, the Ninth Circuit cites its opinion from *Leroy Land* in *Commercial Builders* as authority for the conclusion that *Nollan* did not change the condition/impacts nexus relationship. *Commercial Builders*, 941 F.2d at 874-75.

Petitioner's reference to *Amoco Oil Co. v. Village of Schaumburg*, 1992 WL 229591 (N.D. Ill. September 11, 1992), where the court ordered dismissal for lack of federal jurisdiction, is especially curious. The precedential weight of a District Court case not decided on the merits must be considered nil.

The Petition apparently refers to *Pengilly v. Multnomah County*, 810 F. Supp. 1111 (D. Or. 1992), as proof of lower court confusion after *Nollan*. Given that the opinion merely accepts the possibility, explicitly left open in *Nollan*, 483 U.S. at 835, that the state may use the cumulative impact of development as its rationale for application of a land use condition to a single property owner, the argument that it conflicts with *Nollan* is groundless.

2. There is no conflict with the decisions of state courts

Petitioner cites several state court opinions as evidence of conflict. However, the cases cited again convey only Petitioner's lack of understanding of *Nollan*.

Petitioner's reference to *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989) is disingenuous. The quoted material comes not directly from the Court of Appeals, but rather from a commentator, and should have been cited as such by Petitioner.[24] Regardless, Petitioner has confused the relevant test; Petitioner is contending conflict as to the proper relationship of conditions and exactions, but the referenced material is discussing the relationship of conditions and state interests. In addition, the case involves a facial challenge to the ordinance at issue, not a challenge to a condition of development.

Petitioner's reference to *Steinbergh v. City of Cambridge*, 604 N.E.2d 1269 (Mass. 1992) attempts to compare Takings Clause analysis with those under Due Process and Equal Protection. As set out above, *Nollan* expressly repudiated such comparison. *Nollan*, 483 U.S. at 834 n.3. Also, the *Steinbergh* court quoted approvingly the portion of *Commercial Builders* discussed above, rejecting the notion that *Nollan* materially changes the level of scrutiny. *Steinbergh*, 604 N.E.2d at 1276 n. 8. This case is also distinguishable because it is a challenge to a rent control ordinance, not a condition of development.

[24] Petition, 23.

In *Surfside Colony, Ltd. v. California Coastal Com.*, 277 Cal. Rptr. 371 (Cal. Ct. App. 1991), the court discussed a pre-*Nollan* California taking case that had employed the "rational basis" test. It is important to remember that *Nollan* explicitly stated the consistency of its approach with that "taken by every other court that has considered the question, *with the exception of the California state courts.*" *Nollan*, 483 U.S. at 839, (emphasis added) (citations omitted). Indeed, within the California state courts, *Nollan* had changed the analysis. Thus, Petitioner's quotation from *Surfside* is again disingenuous and misleading. The full quote - "it is clear that the rational basis test employed by *Whaler's Village* no longer controls" - is not disputed by Respondent; indeed, it is endorsed. *Surfside*, 277 Cal. Rptr. at 377. The Court also disposed of the merits on the basis of a lack of substantial evidence, which factually distinguishes it from this case.

Petitioner quotes from *Batch v. Town of Chapel Hill*, 376 S.E.2d 22 (N.C. Ct. App. 1989), *rev'd on other grounds*, 387 S.E.2d 655 (N.C. 1990), but fails to note that it was decided on state law grounds "based on the principles enunciated in *Nollan*, the rationale of the North Carolina subdivision enabling statute, and the policy underlying the map act." *Batch*, 376 S.E.2d at 34. This case is distinguishable because it was decided on independent state grounds.

Petitioner's reference to *Bernardsville Quarry v. Bernardsville Borough*, 608 A.2d 1377 (N.J. 1992) is also disingenuous. The quoted material was not set out by the

court in the context of a constitutional test.[25] Regardless, the entire opinion contains no interpretative analysis of *Nollan*, which is cited only once in passing.

CONCLUSION

The rhetoric of the Petition overwhelms the reality of this case. Petitioners underlying premise, that *Nollan* changed the required relationship between the impacts of a development and a local government exaction is wrong. The Petition misstates the nature of this case, relies on faulty analysis of this Court's opinions, and asserts the existence of conflicts among lower court decisions where none exists. The Oregon Supreme Court correctly and succinctly rejected Petitioner's theory and this Court should do the same by denying the Petition.

DATED this 4th day of November, 1993.

Respectfully submitted,

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[25] Petition, 25 through 26.

APPENDIX A

ASSIGNMENTS OF ERROR

Dolan v City of Tigard
LUBA No. 90-092

Assignment of Error No. 1

The City's decision to demand the dedication to the City of those portions of Petitioners' land lying 15 feet to the east of the 100-year floodplain boundary constitutes an unlawful taking in violation of Petitioners' rights under the Oregon and United States Constitutions.

Assignment of Error No. 2

The city council's exaction of all portions of Petitioners' property falling within the 100-year floodplain constitutes an unlawful taking of private property for public use, in violation of the Oregon and United States Constitutions.

Assignment of Error No. 3

The city's requirement that the "roof sign" be removed within 45 days of occupancy of the new building was unreasonable and hence a denial of due process.

Dolan v City of Tigard
LUBA No. 91-161

Assignment of Error No. 1

The City's decision to demand the dedication to the City of those portions of Petitioners' land

lying 15 feet to the east of the 100-year floodplain boundary constitutes an unlawful taking in violation of Petitioners' rights under the Oregon and United States Constitutions.

Assignment of Error No. 2

The City Council's exaction of all portions of Petitioners' property falling within the 100-year floodplain constitutes an unlawful taking of private property for public use, in violation of the Oregon and United States Constitutions.

Assignment of Error No. 3

The City has characterized an existing wall sign as a "roof sign." By mischaracterizing the sign, the City then establishes a requirement that the sign be removed within 45 days of occupancy of the new building which is unreasonable and hence a denial of due process.

Dolan v City of Tigard
Court of Appeals
CA No. A73769

Assignment of Error No. 1

LUBA erred by failing to hold that the city, by denying the Petitioners' variance, in violation of Article I section 18 of the Oregon Constitution, and the Fifth and Fourteenth Amendments of the United States Constitution, took, without payment of just compensation, the private property of Petitioners by requiring the dedication of private property of the Petitioners for permanent physical occupation by the public as a pedestrian/bicycle pathway.

Assignment of Error No. 2

LUBA erred by affirming the city's denial of the Petitioners' variance. The city's decision was in violation of the Fifth and Fourteenth Amendments of the United States Constitution, taking, without payment of just compensation, the private property of Petitioners. The city's decision required the dedication, without a showing of a substantial relationship between the proposed use and the dedication exaction, the private property of the Petitioners for public use as a greenway and a pedestrian/bicycle pathway.

APPENDIX B

18.120.020 Applicability of Provisions

A. Site development review shall be applicable to all new developments and major modification of existing developments, as provided in Section 18.120.070 except it shall not apply to:

1. Single-family detached dwellings;
2. Manufactured homes on individual lots;
3. A duplex, which is not being reviewed as part of any other development;
4. Minor modifications as provided in Section 18.120.070;
5. Any proposed development which has a valid conditional use approved through the conditional use permit application process; or
6. Mobile home parks and subdivisions;
7. Family day care;
8. Home occupation;
9. Temporary use;
10. Fuel tank; or
11. Accessory structures. (Ord. 90-41; Ord. 89-06; Ord. 87-66; Ord. 84-61; Ord. 84-50; Ord. 83-52)

18.120.070 Major Modification to Approved Plans or Existing Development

A. An applicant may request approval of a modification to an approved plan or existing development by:

1. Providing the Director with three copies of the proposed modified site development plan; and
2. A narrative which indicates the rationale for the proposed modification addressing the changes listed in subsection B below.

B. The Director shall determine that a major modification(s) will result if one or more of the following changes are proposed. There will be:

1. An increase in dwelling unit density, or lot coverage for residential development;
2. A change in the ratio or number of different types of dwelling units;
3. A change that requires additional on-site parking in accordance with Chapter 18.106;
4. A change in the type of commercial or industrial structures as defined by the Uniform Building Code;
5. An increase in the height of the building(s) by more than 20 percent;
6. A change in the type and location of accessways and parking areas where off-site traffic would be affected;

7. An increase in vehicular traffic to and from the site and the increase can be expected to exceed 20 vehicles per day;

8. An increase in the floor area proposed for a nonresidential use by more than 10 percent excluding expansions under 5,000 square feet;

9. A reduction in the area reserved for common open space and/or usable open space which reduces the open space area below the minimum required by this code or reduces the open space area by more than 10 percent;

10. A reduction of project amenities below the minimum established by this code or by more than 10 percent where specified in the site plan:

    a. Recreational facilities;

    b. Screening; and/or

    c. Landscaping provisions; and

11. A modification to the conditions imposed at the time of site development review approval which are not the subject of B. 1 through 10 above of this subsection.

C. Upon determining that the proposed modification to the site development plan is a major modification, the applicant shall submit a new application in accordance with Sections 18.120.030 and 18.120.090 for site development review prior to any issuance of building permits.

D. The Director's decision may be appealed as provided by Subsection 18.32.310.A. Notice of the Director's decision need not be given. (Ord. 90-41; Ord. 89-06; Ord. 83-52)

18.120.180 Approval Standards

A. The Director shall make a finding with respect to each of the following criteria when approving, approving with conditions, or denying an application:

1. Provisions of the following chapters:

    a. Chapter 18.84, Sensitive Lands;

    b. Chapter 18.94, Manufactured/ Mobile Home Regulations;

    c. Chapter 18.92, Density Computation;

    d. Chapter 18.144, Accessory Use and Structures;

    e. Chapter 18.96, Additional Yard Area Requirements;

    f. Chapter 18.98, Building Height Limitations; Exceptions;

    g. Chapter 18.100, Landscaping and Screening;

    h. Chapter 18.102, Visual Clearance Areas;

    i. Chapter 18.106, Off-Street Parking and Loading;

j. Chapter 18.108, Access, Egress, and Circulation;

k. Chapter 18.114, Signs;

l. Chapter 18.150, Tree Removal; and

m. Chapter 18.164, Street and Utility Improvement Standards.

2. Relationship to the Natural and Physical Environment:

a. Buildings shall be:

(i) Located to preserve existing trees, topography, and natural drainage;

(ii) Located in areas not subject to ground slumping or sliding;

(iii) Located to provide adequate distance between adjoining buildings for adequate light, air circulation, and firefighting; and

(iv) Oriented with consideration for sun and wind; and

b. Trees having a six inch caliper or greater shall be preserved or replaced by new plantings of equal character; and

3. Exterior Elevations:

a. Along the vertical face of single-family attached and multiple-family structures, offsets shall occur at a minimum of every 30 feet by providing any two of the following:

(i) Recesses (decks, patios, entrances, floor area, etc.), of a minimum depth of eight feet;

(ii) Extensions (decks, patios, entrances, floor area, etc.) of a minimum depth of eight feet, a maximum length of an overhang shall be 25 feet; and

(iii) Offsets or breaks in roof elevations of three or more feet in height;

4. Buffering, Screening, and Compatibility between Adjoining Uses:

a. Buffering shall be provided between different types of land uses (for example, between single-family and multiple-family residential, and residential and commercial), and the following factors shall be considered in determining the adequacy of the type and extent of the buffer:

(i) The purpose of the buffer, for example to decrease noise levels, absorb air pollution, filter dust, or to provide a visual barrier;

(ii) The size of the buffer required to achieve the purpose in terms of width and height;

(iii) The direction(s) from which buffering is needed;

(iv) The required density of the buffering; and

(v) Whether the viewer is stationary or mobile;

b. On site screening from view from adjoining properties of such things as service areas, storage areas, parking lots, and mechanical devices on roof tops, i.e., air cooling and heating systems, shall be provided and the following factors will be considered in determining the adequacy of the type and extent of the screening:

(i) What needs to be screened;

(ii) The direction from which it is needed;

(iii) How dense the screen needs to be;

(iv) Whether the viewer is stationary or mobile; and

(v) Whether the screening needs to be year around;

5. Privacy and Noise:

a. Structures which include residential dwelling units shall provide private outdoor areas for each ground floor unit which is screened from view by adjoining units as provided in Subsection 6.a below;

b. The buildings shall be oriented in a manner which protects private

spaces on adjoining properties from view and noise;

c. Residential building shall be located on the portion of the site having the lowest noise levels; and

d. On-site uses which create noise, lights, or glare shall be buffered from adjoining residential uses; (See Section 18.120.180.A.4)

6. Private Outdoor Area: Residential Use:

a. Private open space such as a patio or balcony shall be provided and shall be designed for the exclusive use of individual units and shall be at least 48 square feet in size with a minimum width dimension of four feet; and;

(i) Balconies used for entrances or exits shall not be considered as open space except where such exits or entrances are for the sole use of the unit; and

(ii) Required open space may include roofed or enclosed structures such as a recreation center or covered picnic area;

b. Wherever possible, private outdoor open spaces should be oriented toward the sun; and

c. Private outdoor spaces shall be screened or designed to provide privacy for the users of the space;

7. Shared Outdoor Recreation Areas: Residential Use:

   a. In addition to the requirements of subsections 5 and 6 above, usable outdoor recreation space shall be provided in residential developments for the shared or common use of all the residents in the following amounts;

      (i) Studio up to and including two-bedroom units, 200 square feet per unit; and

      (ii) Three or more bedroom units, 300 square feet per unit;

   b. The required recreation space may be provided as follows:

      (i) It may be all outdoor space; or

      (ii) It may be part outdoor space and part indoor space; for example, an outdoor tennis court, and indoor recreation room;

      (iii) It may be all public or common space;

      (iv) It may be part common space and part private; for example, it could be an outdoor tennis court, indoor recreation room and balconies on each unit; and

      (v) Where balconies are added to units, the balconies shall not be less than 48 square feet;

   c. Shared outdoor recreation space shall be readily observable for reasons of crime prevention and safety;

8. Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.

9. Demarcation of Public, Semipublic, and Private Spaces: Crime Prevention:

   a. The structures and site improvements shall be designed so that public areas such as streets or public gathering places, semipublic areas and private outdoor areas are clearly defined in order to establish persons having a right to be in the space, in order to provide for crime prevention and to establish maintenance responsibility; and

   b. These areas may be defined by;

      (i) A deck, patio, low wall, hedge, or draping vine;

      (ii) A trellis or arbor;

(iii) A change in level;

(iv) A change in the texture of the path material;

(v) Sign; or

(vi) Landscaping;

10. Crime Prevention and Safety:

a. Windows shall be located so that areas vulnerable to crime can be surveyed by the occupants;

b. Interior laundry and service areas shall be located in a way that they can be observed by others;

c. Mail boxes shall be located in lighted areas having vehicular or pedestrian traffic;

d. The exterior lighting levels shall be selected and the angles shall be oriented towards areas vulnerable to crime; and

e. Light fixtures shall be provided in areas having heavy pedestrian or vehicular traffic and in potentially dangerous areas such as parking lots, stairs, ramps, and abrupt grade changes:

(i) Fixtures shall be placed at a height so that light patterns overlap at a height of seven feet which is sufficient to illuminate a person;

11. Access and Circulation:

a. The number of allowed access points for a development shall be as provided in Section 18.108.070;

b. All circulation patterns within a development shall be designed to accommodate emergency vehicles; and

c. Provisions shall be made for pedestrianways and bicycleways if such facilities are shown on an adopted plan;

12. Public Transit:

a. Provisions within the plan shall be included for providing for transit if the development proposal is adjacent to existing or proposed transit route;

b. The requirements for transit facilities shall be based on:

(i) The location of other transit facilities in the area; and

(ii) The size and type of the proposal;

c. The following facilities may be required after City and Tri-Met review:

(i) Bus stop shelters;

(ii) Turnouts for buses; and

(iii) Connecting paths to the shelters;

13. Parking:

    a. All parking and loading areas shall be designed in accordance with the requirements set forth in Sections 18.106.050 and 18.106.090. Chapters 18.102, Visual Clearance, and 18.108, Access, Egress, and Circulation;

14. Landscaping:

    a. All landscaping shall be designed in accordance with the requirements set forth in Chapter 18.100.

    b. In addition to the open space and recreation area requirements of subsections 5 and 6 above, a minimum of 20 percent of the gross area including parking, loading and service areas shall be landscaped; and

    c. A minimum of 15 percent of the gross site area shall be landscaped;

15. Drainage:

    a. All drainage plans shall be designed in accordance with the criteria in the adopted 1981 master drainage plan;

16. Provision for the Handicapped:

    a. All facilities for the handicapped shall be designed in accordance with the requirements set forth in ORS Chapter 487; and

17. Signs:

    a. All sign placement and construction shall be designed in accordance with requirements set forth in Chapter 18.114.

18. All of the provisions and regulations of the underlying zone shall apply unless modified by other sections or this title (e.g., the Planned Development, Chapter 18.80.; or a Variance granted under Chapter 18.134; etc.) (Ord. 90-41; Ord. 89-06; Ord. 84-29; Ord. 83-52)

18.32.250 The Decision Process of the Approval Authority

A. The decision shall be based on:

    1. Proof by the applicant that the application fully complies with:

        a. The City of Tigard comprehensive plan; and

        b. The relevant approval standard found in the applicable chapter(s) of this title or other applicable implementing ordinances;

    2. The standards and criteria that were applicable at the time the application was determined to be complete at such time as the City's plan and applicable ordinances are acknowledged.

B. Consideration may also be given to:

1. Proof of a change in the neighborhood or community or a mistake in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application; and

2. Factual oral testimony or written statements from the parties, other persons and other governmental agencies relevant to the existing conditions, other applicable standards and criteria, possible negative or positive attributes of the proposal or factors in Subsections A or B.1 of this section.

C. In all cases, the decision shall include a statement in a form addressing the requirements of Subsection 18.32.060.A.3.b which refers to the Director's staff report.

D. The approval authority may:

1. Adopt findings and conclusions contained in the staff report;

2. Adopt findings and conclusions of a lower approval authority;

3. Adopt its own findings and conclusions;

4. Adopt findings and conclusions submitted by any party provided all parties have had an opportunity to review the findings and comment on the same; or

5. Adopt findings and conclusions from another source, either with or without

modification, having made a tentative decision, and having directed staff to prepare findings for review and to provide an opportunity for all parties to comment on the same.

E. The decision may be for denial, approval, or approval with conditions, pursuant to subsection 2 of this section.

1. Conditions may be imposed where such conditions are necessary to:

a. Carry out applicable provisions of the Tigard comprehensive plan;

b. Carry out the applicable implementing ordiances; and

c. Ensure that adequate public services are provided to the development or to ensure that other required improvements are made;

2. Conditions may include, but are not limited to;

a. Minimum lot sizes;

b. Larger setbacks;

c. Preservation of significant natural features; and

d. Dedication of easements;

3. Conditions of approval shall be fulfilled within the time limit set forth in the decision or, if no time limit is set forth, within one year. Failure to fulfill any condition of approval within the time limitations provided may be grounds for revocation of approval,

after notice and an opportunity to be heard as an administrative action;

4. Changes, alterations or amendments to the substance of the conditions of approval shall be processed as a new administrative action;

5. Prior to the commencement of development, i.e. the issuance of any permits or the taking of any action under the approved development application, the owner and any contract purchasers of the property which is the subject of the approved application, may be required to sign and deliver to the Director their acknowledgment and consent to such conditions;

6. The conditional approval may require the owner of the property to sign within a time certain or, if no time is designated, within a reasonable time, a contract with the City for enforcement of the conditions and:

   a. The Council shall have the authority to execute such contracts on behalf of the City;

   b. If a contract is required by a conditional approval, no building permit shall be issued for the use covered by the application until the executed contract is recorded in a real property record of the applicable County and filed in the County records; and

   c. Such contracts shall be enforceable against the signing parties, their

heirs, successors and assigns by the City by appropriate action in law or suit in equity for the benefit of public health, safety, and welfare; and

7. A bond in a form acceptable to the Director or, upon appeal or review by the appropriate approval authority, a cash deposit from the property owners or contract purchasers in such an amount as will ensure compliance with the conditions imposed pursuant to the Section, may be required. Such bond or deposit shall be posted prior to the issuance of a building permit for the use covered by the application.

F. The final decision on the application may grant less than all of the parcel which is the subject of the application. (Ord. 90-41; Ord. 89-06; Ord. 83-52)

APPENDIX C

197.825 Jurisdiction of board; limitations; effect on circuit court jurisdiction. (1) Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the board shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

(2) The jurisdiction of the board:

(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review;

(b) Is subject to the provisions of ORS 197.850 relating to judicial review by the Court of Appeals;

(c) Does not include those matters over which the department has review authority under ORS 197.430 to 197.455 and 197.649 and 197.650;

(d) Does not include those land use decisions of a state agency over which the Court of Appeals has jurisdiction for initial judicial review under ORS 183.400, 183.482 or other statutory provisions;

(e) Does not include any rules, programs, decisions, determinations or activities carried out under ORS 527.610 to 527.770, 527.990 (1) and 527.992; and

(f) Is subject to ORS 196.115 for any county land use decision that may be reviewed by the Columbia River Gorge Commission pursuant to sections 10(c) or 15(a)(2) of the Columbia River Gorge National Scenic Area Act, P.L. 99-663.

(3) Notwithstanding subsection (1) of this section, the circuit courts of this state retain jurisdiction:

(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015 (10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; and

(b) To enforce orders of the board in appropriate proceedings brought by the board or a party to the board proceeding resulting in the order. [1983 c.827 §30; 1987 c.729 §14; 1987 c.856 §9; 1987 c.919 §4; 1989 c.761 §11; 1991 c.817 §4]

197.828 Board review of limited land use decision. (1) The Land Use Board of Appeals shall either reverse, remand or affirm a limited land use decision on review.

(2) The board shall reverse or remand a limited land use decision if:

(a) The decision is not supported by substantial evidence in the record. The existence of evidence in the record supporting a different decision shall not be grounds for reversal or remand if there is evidence in the record to support the final decision;

(b) The decision does not comply with applicable provision of the land use regulations;

(c) The decision is:

(A) Outside the scope of authority of the decision maker; or

(B) Unconstitutional; or

(d) The local government committed a procedural error which prejudiced the substantial rights of the petitioner. [1991 c.817 §2]

Note: 197.828 was added to and made a part of ORS chapter 197 by legislative action but was not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

197.835 Scope of review. (1) The board shall review the land use decision or limited land use decision and prepare a final order affirming, reversing or remanding the land use decision or limited land use decision. The board shall adopt rules defining the circumstances in which it will reverse rather than remand a land use decision or limited land use decision that is not affirmed.

(2) Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763. A petitioner may raise new issues to the board if:

(a) The local government failed to follow the requirements of ORS 197.763; or

(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the

notice of the proposed action did not reasonably describe the local government's final action.

(3) The board shall reverse or remand a land use decision not subject to an acknowledged comprehensive plan and land use regulations if the decision does not comply with the goals. The board shall reverse or remand a land use decision or limited land use decision subject to an acknowledged comprehensive plan or land use regulation if the decision does not comply with the goals and the commission has issued an order under ORS 197.320 or adopted a new or amended goal under ORS 197.245 requiring the local government to apply the goals to the type of decision being challenged.

(4) The board shall reverse or remand an amendment to a comprehensive plan if the amendment is not in compliance with the goals.

(5) The board shall reverse or remand an amendment to a land use regulation or the adoption of a new land use regulation if:

(a) The regulation is not in compliance with the comprehensive plan; or

(b) The comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation, and the regulation is not in compliance with the statewide planning goals.

(6) The board shall reverse or remand a decision involving the application of a plan or land use regulation provision if the decision is not in compliance with applicable provisions of the comprehensive plan or land use regulations.

(7) In addition to the review under subsections (1) to (6) of this section, the board shall reverse or remand the land use decision under review if the board finds:

(a) The local government or special district:

(A) Exceeded its jurisdiction;

(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

(C) Made a decision not supported by substantial evidence in the whole record;

(D) Improperly construed the applicable law; or

(E) Made an unconstitutional decision; or

(b) The state agency made a decision that violated the goals.

(8) The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds, based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances. If the board does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government.

(9)(a) Whenever the findings, order and record are sufficient to allow review, and to the extent possible consistent with the time requirements of ORS 197.830

(14), the board shall decide all issues presented to it when reversing or remanding a land use decision described in subsections (2) to (7) of this section or limited land use decision described in ORS 197.828 and 197.195.

(b) Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.

(10) The board may reverse or remand a land use decision under review due to ex parte contacts or bias resulting from ex parte contacts with a member of the decision-making body, only if the member of the decision-making body did not comply with ORS 215.422 (3) or 227.180 (3), whichever is applicable.

(11) Subsection (10) of this section does not apply to reverse or remand of a land use decision due to ex parte contact or bias resulting from ex parte contact with a hearings officer.

(12) The board shall reverse or remand a land use decision or limited land use decision which violates a commission order issued under ORS 197.328.

(13) In cases in which a local government provides a quasi-judicial land use hearing on a limited land use decision, the requirements of subsections (10) and (11) of this section apply. [1983 c.827 §§32, 32a; 1985 c.811 §15;

1987 c.729 §2; 1989 c.648 §57; 1989 c.761 §13; 1991 c.817 §13]

197.830 Review procedures; standing; deadlines; issues subject to review; attorney fees and costs; publication of orders. (1) Review of land use decisions or limited land use decisions under ORS 197.830 to 197.845 shall be commenced by filing a notice of intent to appeal with the Land Use Board of Appeals.

(2) Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:

(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and

(b) Appeared before the local government, special district or state agency orally or in writing.

(3) If a local government makes a land use decision without providing a hearing or the local government makes a land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

(a) Within 21 days of actual notice where notice is required; or

(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.

(4) If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

(a) Within 21 days of actual notice where notice is required; or

(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.

(5)(a) Except as provided in paragraph (b) of this subsection, the appeal period described in subsection (3) of this section shall not exceed three years after the date of the decision.

(b) If notice of a hearing or an administrative decision made pursuant to ORS 197.763, 197.195, 215.416 (11) or ORS 227.175 (10) is required but has not been provided, the provisions of paragraph (a) of this subsection do not apply.

(6)(a) Within a reasonable time after a petition for review has been filed with the board, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.

(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be

made a party to the review proceedings, as set forth in subsection (1) of this section, are:

(A) The applicant who initiated the action before the local government, special district or state agency; or

(B) Persons who appeared before the local government, special district or state agency, orally or in writing.

(7) If a state agency whose order, rule, ruling, policy or other action is at issue is not a party to the proceeding, it may file a brief with the board as if it were a party. The brief shall be due on the same date the respondent's brief is due.

(8) A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615. Copies of the notice of intent to appeal shall be served upon the local government, special district or state agency and the applicant of record, if any, in the local government, special district or state agency proceeding. The notice shall be served and filed in the form and manner prescribed by rule of the board and shall be accompanied by a filing fee of $50 and a deposit for costs to be established by the board. If a petition for review is not filed with the board as required in subsections (9) and (10) of this section, the filing fee and deposit shall be awarded to the local government, special district or state agency as cost of preparation of the record.

(9) Within 21 days after service of the notice of intent to appeal, the local government, special district or state agency shall transmit to the board the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceeding the record may be shortened. The board may require or permit subsequent corrections to the record.

(10) A petition for review of the land use decision or limited land use decision and supporting brief shall be filed with the board as required by the board under subsection (12) of this section. Issues shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763. A petitioner may raise new issues to the board if:

(a) The local government failed to follow the requirements of ORS 197.763; or

(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final action.

(11) The petition shall include a copy of the decision sought to be reviewed and shall state:

(a) The facts that establish that the petitioner has standing.

(b) The date of the decision.

(c) The issues the petitioner seeks to have reviewed.

(12)(a) The board shall adopt rules establishing deadlines for filing petitions and briefs and for oral argument.

(b) At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision. If the petitioner is dissatisfied with the local government or agency action after withdrawal for purposes of reconsideration, the petitioner may refile the notice of intent and the review shall proceed upon the revised order. An amended notice of intent shall not be required if the local government or state agency, on reconsideration, affirms the order or modifies the order with only minor changes.

(13)(a) Review of a decision under ORS 197.830 to 197.845 shall be confined to the record.

(b) In the case of disputed allegations of unconstitutionality of the decision, standing, ex parte contacts or other procedural irregularities not shown in the record which, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record.

(14) The board shall issue a final order within 77 days after the date of transmittal of the record. If the order is not issued within 77 days the applicant may

apply in Marion County or the circuit court of the county where the application was filed for a writ of mandamus to compel the board to issue a final order.

(15)(a) Upon entry of its final order the board may, in its discretion, award costs to the prevailing party including the cost of preparation of the record if the prevailing party is the local government, special district or state agency whose decision is under review. The deposit required by subsection (8) of this section shall be applied to any costs charged against the petitioner.

(b) The board may also award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded, and primarily for a purpose other than to secure appropriate action by the board.

(16) Orders issued under this section may be enforced in appropriate judicial proceedings.

(17) The board shall provide for the publication of its orders that are of general public interest in the form it deems best adapted for public convenience. The publications shall constitute the official reports of the board. The board shall provide the publisher with a list of those public officers who shall receive the publications without charge. The board shall determine the sale prices, and all moneys collected or received from sales shall be paid into the Board Publications Account established by ORS 197.832.

(18) Except for those sums collected for publication of board opinions, all fees collected by the board under

this section that are not awarded as costs shall be paid over to the State Treasurer to be credited to the General Fund. [1983 c.827 §31; 1985 c.119 §3; 1987 c.278 §1; 1987 c.729 §16; 1989 c.761 §12; 1991 c.817 §7]

197.005 Legislative findings. The Legislative Assembly finds that:

(1) Uncoordinated use of lands within this state threaten the orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of this state.

(2) To promote coordinated administration of land uses consistent with comprehensive plans adopted throughout the state, it is necessary to establish a process for the review of state agency, city, county and special district land conservation and development plans for compliance with goals.

(3) Except as otherwise provided in subsection (4) of this section, cities and counties should remain as the agencies to consider, promote and manage the local aspects of land conservation and development for the best interests of the people within their jurisdictions.

(4) The promotion of coordinated statewide land conservation and development requires the creation of a statewide planning agency to prescribe planning goals and objectives to be applied by state agencies, cities, counties and special districts throughout the state. [1973 c.80 §1; 1977 c.664 §1; 1981 c.748 §21]

APPENDIX D

RULE 5.45 ASSIGNMENTS OF ERROR

(1) Assignments of error are required in all opening briefs of appellants and cross-appellants.

(2) No matter assigned as error will be considered on appeal unless it was preserved in the lower court and assigned as error in the party's opening brief; provided that the appellate court may consider errors of law apparent on the face of the record.

(3) An assignment of error that would require the court to search for the pertinent portion of the record in which the matter complained of appears shall not be considered.

(4) Each assignment of error shall be clearly and concisely stated under a separate and appropriate heading, must be specific and must set out verbatim the pertinent portions of the record, if it relates to a specific ruling that is being challenged.

(5) The arrangement and form of assignments of error, together with reference to pages of the transcript or narrative statement, should conform to the illustrations in Appendix H.

(6) A separate argument shall follow each assignment of error, except that if several assignments of error present essentially the same legal question, the argument in support of them shall be combined so far as practicable. At the beginning of each argument the appellant

shall identify the applicable standard of review,[1] followed by citation to the statute, case law or other legal authority for that standard of review.

(7) A brief not complying with these rules may be stricken in whole or in part.

[Adopted effective January 1, 1990.]

B. JUDICIAL REVIEW OF FINAL ORDERS OF THE LAND USE BOARD OF APPEALS (LUBA)

RULE 4.60 IN GENERAL

Insofar as practicable, and except where some other procedure is provided by statute or these rules, the procedure for judicial review of final orders of the Land Use Board of Appeals shall be the same as for judicial review of administrative proceedings.

See ORS 197.850.

[Adopted effective January 1, 1990.]

---

[1] Standards of review include but are not limited to do novo review and substantial evidence for factual issues, errors of law and abuse of discretion for legal issues, and special statutory standards of review such as those found in the Administrative Procedures Act, ORS 183.400(4) and ORS 183.480(7) and (8).

4. JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY PROCEEDINGS

A. GENERALLY

RULE 4.05 PROCEDURE TO CONFORM TO CIVIL CASES

Insofar as practicable, and except where some other procedure is provided by statute[1] or these rules, the procedure for judicial review of an order in a contested case, judicial review of a rule or judicial review of a ruling arising out of a declaratory ruling proceeding shall be the same as for appeals in civil cases.

[Adopted effective January 1, 1990.]

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[1] *See, e.g.*, ORS 656.298, relating to workers' compensation cases. *See generally* ORS 183.400 and 183.400 to 183.497.

Supreme Court, U.S.
FILED
NOV 10 1993
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No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Petition For Writ Of Certiorari
To The Oregon Supreme Court

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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The City of Tigard, in its opposing brief in No. 93-518, contends this Court may not review the findings of the City of Tigard to determine if those findings are legally sufficient under heightened scrutiny to satisfy the "essential nexus" required by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 840-841 (1987). The city argues:

> Petitioner's continuing attack on the sufficiency of the City's findings throughout the Petition misleads this Court into thinking such an attack is possible at this point in this case. It has been thoroughly explained above that Petitioner has accepted the City's factual findings and the evidentiary support for those findings.
>
> Brief in Opp., p. 19.

The city has erroneously characterized the nature of Mrs. Dolan's challenge of its findings – Mrs. Dolan is challenging the legal adequacy of those findings, not the evidentiary basis of those findings.

At every level of review, from the Oregon Land Use Board of Appeals (LUBA) through the Oregon Supreme Court, the petitioner, Mrs. Dolan, has contended the City's findings were legally inadequate to justify forcing her to dedicate 7000 square feet of her commercial property to the city.

To LUBA, Mrs. Dolan argued "the City [has not] demonstrated this development will place additional burdens on the City's storm drainage," noting "[i]t is not suggested anywhere in the record that this construction will contribute to the volume of upstream runoff." Petition for Review at 10, n.5, *Dolan v. City of Tigard*, 22 Or.

L.U.B.A. 617 (1992) (reproduced in Pet. for Cert., App. D). She also contended "the construction of a larger store . . . is in no way related to the City's articulated need for a bike path." *Id.*

To the Oregon Court of Appeals, petitioner again argued "the city's findings, underlying its denial of the petitioners' variance and upholding its exactions, fail to show . . . [the *Nollan* essential nexus of a] 'substantial relationship.' " Petitioner's Brief and Abstract of Record at 26, *Dolan v. City of Tigard*, 113 Or. App. 162, 832 P.2d 853 (1992) (reproduced in Pet. for Cert., App. C).

To the Oregon Supreme Court, petitioner continued to assert that "the nexus analysis conducted by the City of Tigard did not even attempt to establish that the Dolan's [sic] dedication of land was directly and proximately necessitated by the stormwater runoff and additional pedestrian and bicyclist traffic which their enlarged commercial facility would engender." Petition for Review at 8, *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993) (reproduced in Pet. for Cert., App. A).

The Oregon Supreme Court, in its opinion, recognized that contention when it stated petitioners' argument was first that the "city has not demonstrated an essential nexus between its exactions and the demands that petitioners' proposed use will impose on public services and facilities," and second that the "city cannot demonstrate even a 'reasonable relationship' between their development's impacts and city's exactions." Pet. for Cert., App. A-10, 11 (footnote omitted).

Thus, at every level of review in the State of Oregon, Mrs. Dolan has asserted that the city's factual findings

are not legally sufficient to justify the city's exactions on her under this Court's rule in *Nollan*.[1] It is clear the burden was on the city to show those findings met the "essential nexus." *See* Pet. for Cert., App. A-18 (Peterson, J., dissenting) ("As does the majority, I place the burden of proving these two elements [of the exactions test in *Nollan*] on the government that exacts the conditions."). It also is clear the Oregon Supreme Court found it was possible for it to review the legal sufficiency of the city's findings. Such review was fully consistent with its precedents. *See State v. Herbert*, 302 Or. 237, 241, 729 P.2d 547 (1986) (trial court legal conclusions are not binding on appellate courts; questions of law are fully reviewable on appeal).

To this Court, as she did at LUBA and in the Oregon courts below, Mrs. Dolan argues the exactions of the City of Tigard, based upon the factual findings of the city, fail to substantially advance a legitimate state interest because those findings fail to demonstrate an "essential nexus" with the city's condition that she dedicate to it 7000 square feet of her private commercial property. Whether she ever disputed the evidentiary basis of those findings is irrelevant, if those "undisputed" findings are legally insufficient to show that nexus.

At every level below, the city asserted the same argument it now makes to this Court: that it would be inappropriate for the reviewing court to entertain an attack on "alleged deficiencies in the City's findings of fact, and the

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[1] Mrs. Dolan has never disputed the purported factual basis for those findings. *See* Pet. for Cert., App. A-16.

evidentiary support for those findings." Brief in Opp., p. 14. The city made the same futile argument at LUBA[2], in the Oregon Court of Appeals[3], and in the Oregon Supreme Court[4]. In every case, the reviewing body adjudicated the merits of the petitioners' argument the city's findings were legally insufficient to justify the exactions imposed on the Dolans by the city.

Mrs. Dolan asserts LUBA and the courts below erred, and misconstrued this Court's decision in *Nollan*, when they found those findings were legally sufficient to justify the city's exactions. As Justice Peterson of the Oregon Supreme Court concluded, "The findings here do not establish any cognizable remediable purpose attributable to the change in use." Pet. for Cert. at A-30 (Peterson, J., dissenting). Petitioner respectfully urges this Court, like

---

[2] "Petitioners do not challenge the evidentiary support for the councils [sic] findings. . . . " Respondent's Brief at 20, *Dolan v. City of Tigard*, 22 Or. L.U.B.A. 617 (1992) (reproduced in Pet. for Cert., App. D).

[3] "Petitioners before LUBA did not challenge the adequacy of the city's findings, nor the evidentiary support for those findings and is precluded from raising such a challenge in this proceeding." Respondent's Brief at 9 (citation omitted), *Dolan v. City of Tigard*, 113 Or. App. 162, 832 P.2d 853 (1992) (reproduced in Pet. for Cert., App. C).

[4] "Petitioners presented no contrary evidence to the city. These findings and the underlying evidence were not challenged by petitioners at LUBA. The only evidence in the record supports the City's conclusions. These facts and the conclusions drawn from those facts are binding on petitioners." Response to Petition for Review at 3 (citations omitted), *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993) (reproduced in Pet. for Cert., App. A).

LUBA and the Oregon courts, to reject the city's protestations its findings may not be reviewed for legal sufficiency against the "essential nexus" test under heightened scrutiny.

DATED: November 10, 1993.

Respectfully submitted,

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October Term, 1993

FLORENCE DOLAN,

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v.

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On Writ Of Certiorari
To The Oregon Supreme Court

JOINT APPENDIX

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Certiorari Granted November 29, 1993

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NOTATION OF APPEARANCE OF OPINIONS AND JUDGMENTS NOT REPRINTED IN THE JOINT APPENDIX

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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Notice of Appellate Judgment of the Land Use Board of Appeals, dated August 9, 1993 ..... F-1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 28, 1991 – Dolans' application for site development review and a variance filed with the city.

September 17, 1991 – Tigard City Council affirms Planning Commission's order approving site development review with conditions imposing exactions on the Dolans' project.

October 4, 1991 – Dolans file their notice of intent to appeal with the Oregon Land Use Board of Appeals.

December 13, 1991 – Dolans file their amended petition for review with the Land Use Board of Appeals.

January 3, 1992 – City files its respondent's brief, answering the amended petition for review.

February 7, 1992 – Final opinion and order of the Land Use Board of Appeals, affirming the city's decision and holding the city's exactions were not unconstitutional.

February 28, 1992 – Dolans file their petition for judicial review with the Oregon Court of Appeals.

May 20, 1992 – Opinion of the Oregon Court of Appeals.

June 24, 1992 – Dolans' petition for review filed with the Oregon Supreme Court.

July 29, 1992 – Oregon Court of Appeals denies reconsideration.

October 27, 1992 – Oregon Supreme Court allows review.

July 1, 1993 – Opinion of the Oregon Supreme Court.

July 28, 1993 – Appellate judgment of the Oregon Supreme Court.

August 9, 1993 – Notice of appellate judgment of the Oregon Land Use Board of Appeals.

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JOHN T. DOLAN and FLORENCE DOLAN, Petitioners, vs. CITY OF TIGARD, Respondent.	LUBA NO. 91-161 NOTICE OF INTENT TO APPEAL (Filed Oct. 4, 1991)

I.

Notice is hereby given that Petitioners intend to appeal the land-use decision of Respondent entitled Notice of Final Order – By City Council, that became final on September 17, 1991, which involves a site development review appeal of tax map and lot number 2S1 2AC, Tax Lot 700, commonly referred to as 12520 S.W. Main Street, regarding the reconstruction of a general retail sales facility, A-Boy Electric Plumbing & Supply, with a new 17,600 square foot building on a 1.67 acre parcel, subject to fifteen (15) conditions. A copy of said Notice of Final Order is attached hereto, marked as Exhibit "A" and incorporated herein by this reference.

II.

Petitioners, John T. Dolan and Florence Dolan are represented by: Joseph R. Mendez of Knappenberger & Mendez, Attorneys at Law, Honeyman House, 1318 S.W. Twelfth Avenue, Portland, Oregon, 97201-3367, telephone (503) 294-0442.

Respondent, City of Tigard, has as its mailing address and telephone number: 13125 S.W. Hall Blvd., P.O. Box 23397, Tigard, Oregon, 97223, telephone (503) 639-4171; and has as its legal counsel: Timothy V. Ramis of O'Donnell, Ramis, *et al.*, Attorneys at Law, 1727 N.W. Hoyt Street, Portland, Oregon, 97209.

III.

Other persons mailed written notice of the land-use decision by City of Tigard as indicated by its records in this matter include: John T. Dolan and Florence Dolan, 405 S.E Brooklyn, Portland, Oregon, 97202.

NOTICE:

Anyone designated in Paragraph III of this Notice who desires to participate as a party in this case before the Land Use Board of Appeals must file with the Board a Motion to Intervene in this proceeding as required by OAR 661-10-050.

KNAPPENBERGER & MENDEZ

By: /s/ Joseph R. Mendez
JOSEPH R. MENDEZ,
OSB #82333
Trial Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 1991, I served a true and correct copy of this Notice of Intent to Appeal on all persons listed in Paragraphs II and III of this Notice, pursuant to OAR 661-10-015(2) by first-class mail, postage paid and deposited in the Post Office at Portland, Oregon.

KNAPPENBERGER & MENDEZ

By: /s/ Joseph R. Mendez
JOSEPH R. MENDEZ,
OSB #82333
Trial Attorney for Petitioners

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

JOHN T. DOLAN and FLORENCE DOLAN,	)	
Petitioners,	)	LUBA NO. 91-161
vs.	)	
CITY OF TIGARD,	)	
Respondent.	)	

AMENDED
PETITION FOR REVIEW

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The City Council's exaction of all portions of Petitioners' property falling within the 100-year flood plain constitutes an unlawful taking of private property for public use, in violation of the Oregon and Untied [sic] States Constitutions.

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The City has characterized an existing wall sign as a "roof sign." By mischaracterizing the sign, the City then establishes a requirement that the sign be removed within 45 days of occupancy of the new building which is unreasonable and hence a denial of due process.

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AMENDED PETITION FOR REVIEW

STANDING OF PETITIONERS

The petitioners, John T. Dolan and Florence Dolan, appeared before the City of Tigard Planning Commission to appeal a decision of the Director placing certain conditions on their application for a variance to the Tigard Community Development Code in order to obtain the issuance of a building permit. The Planning Commission affirmed the Director's decision and Petitioners appealed to the Tigard City Council. In a Notice of Final Order and Resolution No. 91-66, dated September 17, 1991, the City Council allowed Petitioners' appeal in part and denied in part. Petitioners' [sic] filed a Notice of Intent to Appeal this decision as provided in ORS 197.830(1). Petitioners therefore have standing under ORS 197.830(2) to appeal to the Board.

STATEMENT OF THE CASE

Nature of the Decision and Relief Sought

The issues in the instant appeal were previously brought before the Land Use Board of Appeals and assigned LUBA number 90-092. Over the Petitioners' futility objection the Court supported the Respondent's exhaustion of administrative remedies argument and denied the appeal. Petitioners were instructed to pursue a variance to allow the City of Tigard to rectify its error. The Tigard City Council continues to condition the Petitioners' application for a building permit on a requirement that Petitioners give to the City of Tigard that portion of their property falling in the 100-year flood plain as well as an additional 15 foot strip of land which lies parallel and to the east of the flood plain boundary.

The City Council also refuses to reverse that portion of the Planning Commission's Final Order which requires the Petitioners to remove certain signage from an existing structure within forty-five days of receiving a permit to occupy the new building.

Petitioners seek reversal of these portions of the Planning Commission's Final Order, together with instructions consistent with the argument set forth herein.

Summary of Argument

1. The Planning Commission's Final Order constitutes a taking of Petitioners' property without compensation in violation of the Fifth Amendment to the United

States Constitution. The City of Tigard may not condition the grant of a building permit for a plumbing store upon the dedication of a 15 foot strip of Petitioners' property to the City for a bike path and a storm drainage project. For such a condition to be a valid exercise of the City's police power to regulate land use, the City must demonstrate that it bears a direct relation to the burden that will be created by the landowner's plans. The City of Tigard cannot demonstrate that Petitioners' proposal bears any relation to a perceived need for a bike path and a wider storm drainage channel.

2. The Planning Commission's Final Order constitutes a taking of Petitioners' property without compensation in violation of Article 1 Section 18 of the Oregon Constitution. The City of Tigard may not condition the grant of a building permit for a plumbing store upon the dedication of a 15 foot strip of Petitioners' property to the City for a bike path and a storm drainage project. For such a dedication to be a valid exercise of the City's police power to regulate land use, the City must demonstrate that its restrictions on a landowner's application bear some reasonable relation to the burden that will be created by the landowner's plans. The City of Tigard cannot demonstrate that Petitioners' proposal bears any relation to the need for a bike path and a wider storm drainage channel.

3. The City's exaction of Petitioners' flood plain property is indistinguishable from its exaction of 15 feet above the flood plain and violates the United States and Oregon Constitutions for precisely the same reasons.

4. The City has imposed a condition that an offending "roof sign" on the existing building must be removed within 45 days of obtaining a permit to occupy the new building. The condition is unreasonable, and constitutes a denial of due process.

Statement of Facts

Petitioners are the owners of a 1.67 acre lot on Main Street in the City of Tigard, on which there is an existing building used for the operation of a retail electric and plumbing supply store. Petitioners propose to build a larger building better suited to the needs of the business and to raze the existing building. Petitioners applied for a variance to obtain a building permit.[1] Planning Commission Final Order, Record, p. 11, 12.

The southwestern side of Petitioners' property borders Fanno Creek. *See Site Map*, Appendix B. The Community Development Code contemplates greenway adjoining and within the Fanno Creek flood plain. The City contemplated a future reconstruction of the storm drainage channel along the flood plain, necessitating a relocation (encroachment) of the flood plain bank five feet further into Petitioners' property. The Code also called for the eventual development of a community park

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[1] Petitioners previously applied for a variance to City parking requirements for general retail sales businesses to provide only 39 parking spaces, as opposed to the 44 spaces required by the Community Development Code. The variance was reviewed by the Planning Commission and was granted subject to certain conditions, and this portion of the application is not at issue here.

(Fanno Creek Park) in the flood plain abutting Petitioners' property. The Code therefore contemplated eventual construction of a pathway giving access along the greenway to the park. Planning Commission Final Order, Record p. 11, 18, 19, 31.

To fulfill these planning goals, the Staff Report recommended that the permit be conditioned on the dedication by Petitioners to the City of the following land:

> 1. All portions of the site that fall within the existing 100-year flood plain (*i.e.*, all property below elevation 150.0); and
>
> 2. All portions of the site fifteen feet to the east of the 150.0 foot flood plain boundary: The first five feet to accommodate the contemplated eventual reconstruction of the storm drainage channel (and consequent relocation of the creek bank), and the ten remaining feet to provide adequate land for the bike path and vegetative screening.

The total land requested is approximately 7,000 square feet, of which 7,000 [sic] square feet falls above the flood plain boundary.

The Director noted the existence of a nonconforming "roof sign" on the existing building and imposed the following condition on issuance of any occupancy permit for the new building:

> • The existing roof sign shall be permanently removed from the subject property within 45 days of the issuance of the Occupancy Permit for the new building. Condition No. 15, Record at p. 34.

Petitioners appealed the imposition of these and other conditions to the Tigard Planning Commission. The conditions were reiterated in a final order issued by the Commission on July 15, 1991. Petitioners appealed this Order to the Tigard City Council. The Council upheld the Planning Commission's Final Order with one amendment not relevant to the issues presented here.[2]

Petitioners have appealed to this Board.

JURISDICTION

LUBA has exclusive jurisdiction, pursuant to ORS 197.825(1), over Petitioners' appeal of the final land use decision by Respondent City. The City's community Development Code (hereinafter "CDC") provides that a variance may be approved when:

> 1. The proposed variance will not be *materially detrimental* to the purposes of this title, be in conflict with the *policies of the comprehensive plan*, to any other applicable policies and standards, and to other properties in the same zoning district or vicinity;
>
> 2. There are *special circumstances* that exist which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, and which are not applicable to other properties in the same zoning district;

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[2] The Planning Commission's decision eliminates condition of approval number 9 of the Directors Designee's Decision relating to the Traffic Impact Fee.

> 3. The use proposed will be the same as permitted under this title and City standards will be maintained to the *greatest extent that is reasonable* [sic] *possible* while permitting some economic use of the land;
>
> 4. Existing physical and natural systems, such as but not limited to traffic, drainage, dramatic land forms, or parks will not be *adversely affected* any more than would occur if the development were located as specified in the title; and
>
> 5. The hardship is not self-imposed and the variance requested is the *minimum variance which would alleviate the hardship*. CDC Section 18.134.050.A (emphasis added.) [sic]

From the emphasized portions of the CDC governing the approval of variances, it is apparent that the City's decision denying the Petitioners' variance required a significant exercise of factual judgment. This is true notwithstanding the fact that the variance was sought to site development review criteria in order to secure a building permit. Thus, the City's decision is within the exclusive jurisdiction of this board:

> In sum, under ORS 197.015(10)(b)(C) and ORS 197.825(3)(a), circuit court authority ends and the exclusive land use decisional process begins at the point where the granting or denial of a permit involves the exercise of judgment or the interpretation of an ordinance, rather than the mere ministerial application of an ordinance that requires no interpretation or judgment. *Campbell v. Bd. of County Commissioners*, 107 Or. App. 611, 616, ___ P.2d ___ (1991) (circuit court has no jurisdiction over mandamus action to compel denial of building permit.) [sic]

ASSIGNMENT OF ERROR NO. 1

The City's decision to demand the dedication to the City of those portions of Petitioners' land lying 15 feet to the east of the 100-year flood plain boundary constitutes an unlawful taking in violation of Petitioners' rights under the Oregon and United States Constitutions.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 1

1.

Requiring the uncompensated conveyance of this property, as a condition upon the granting of a building permit, constitutes a violation of Petitioners' federal constitutional rights.

The issue presented by this and the prior appeal is whether the City of Tigard can insist that a landowner deed to the City 7,000 square feet of property, with no compensation, as a condition for permitting development. The City insists that the Petitioners permit a physical occupation of their property, that they donate their property interests. Without doubt, if a city official had simply shown up at the Petitioners' door *before* they sought a building permit, and advised them that they must grant this property to the City for a bike path, that act would be an unconstitutional taking.[3]

In *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987), the issue was

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[3] The Fifth Amendment to the United States Constitution provides, in relevant part: "[N]or shall private property be taken for public use, without just compensation."

whether the California Coastal Commission could condition its grant of permission to rebuild a house upon the dedication of an easement across landowners' beachfront property. The Supreme Court's analysis began with this proposition:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather "a mere restriction on its use," is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, *so long as it pays for them.* 483 U.S. at 831.[4] (Emphasis added.) [sic]

Thus, requiring an uncompensated conveyance of Petitioners'property outright, absent a permit application, would clearly be unconstitutional. Here, as in

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[4] *See also, Loretto v. Teleprompter Manhattan CATV Corp,* 458 U.S. 419 (1982), involving the constitutionality of an ordinance requiring owners of rental property to provide cable television installation. The installation to which the landowner objected was a "minor but permanent physical occupation," 458 U.S. at 421, and the court held that it was a taking under the "historical rule" that a "permanent physical occupation of property is a taking" 458 U.S. at 441.

Nollan, the question then is whether requiring the property to be conveyed as a condition for issuing a land-use permit alters the outcome. And the answer here, as in *Nollan,* is that because the condition placed upon the issuance of a permit is unrelated to any burden created by the development, the outcome is the same: The City must either abandon the condition, or pay compensation for the taking.

The Nollans applied to the California Coastal Commission (CCC) for permission to replace the dilapidated bungalow which occupied their parcel of beachfront property with a larger modern residence. The CCC granted the Nollans' application for a permit on the condition that they allow the public an easement of access across their property from one public beach area to the other. On the first appeal the Ventura County Superior Court held that the condition could not be imposed without evidence that the Nollans' proposed construction would have an adverse impact on public access to the beach; the Court remanded for a hearing on that issue.

On rehearing, the Nollans argued that the demand for an easement across their land from north to south was unrelated to the structure they were building. The CCC disagreed, reaffirming its prior holding. It found that the new house would increase blockage of the view of the ocean and contribute to the development of a wall of residential structures along the coastal road; this, in turn, would prevent the public from realizing that it had a right to visit that stretch of coastline, thus impeding "psychological" access to the beach.

The Supreme Court analyzed the problem as follows. The Fifth and Fourteenth Amendments would prevent the CCC for an outright taking of an easement without compensation. *Nollan*, 483 U.S. at 831. On the other hand the Constitution does not prevent California from exercising its legitimate police power to prohibit construction on a particular parcel of land, if the police power prohibition "substantially advances legitimate state interests" and does not "deny an owner economically viable use of his land." *Nollan*, 483 U.S. at 834. Thus a permit condition directed to the same valid police power end would not be a taking either.

> If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner and [sic] alternative to that prohibition which accomplishes the same purpose is ont. [sic] The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. *Nollan*, 483 U.S. at 836-837.

Because compelling a north-south easement along the beach is not reasonably related to the granting of a permit for a building that would not, in fact, interfere with the public's existing access to the beach, the CCC could not compel the easement. Because there is no reasonable relationship between the effect (burden) of the development (the blockage of view from east to west) and the condition imposed (a north-south easement) the exaction of an easement without compensation was unconstitutional.

> In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion. *Nollan*, 483 U.S. at 837.

Under *Nollan*, in order for a development exaction to pass constitutional muster, there must exist a clear match between the exaction and the particular adverse effects of the development. As a dissenter remarked:

> The Court finds this an illegitimate exercise of the police power, because it maintains that there is *no reasonable relationship between the effect of the development and the condition imposed*. *Nollan*, 483 U.S. at 842, Brennan, J., dissenting. (Emphasis Added.) [sic]

The question here is whether the restriction imposed by the City of Tigard upon Petitioners' application bears some reasonable relation to the burden that will be created by Petitioners' plans for a larger plumbing store. The City of Tigard seeks to exact 7,000 square feet of Petitioners' property on the ground that its Community Development Code authorizes a bike path in the Fanno Creek flood plain, and that the City requires a wider storm drainage channel in Fanno Creek. However, the construction of a larger store on the Petitioners' property is in no way related to the City's articulated need for a bike path. Nor has the City demonstrated that this development will place additional burdens upon the City's storm drainage requirements.[5] The nexus required between a burden created by the development and the

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[5] It is not suggested anywhere in the record that this construction will contribute to the volume of upstream runoff.

condition imposed to offset that burden, between the effect of the development and the exaction, is entirely missing in this case.

The most the City of Tigard has demonstrated is a general public purpose. The construction of a bike path is part of its overall program for the Fanno Creek flood plain. However, *Nollan* makes it clear that a valid public purpose is not enough. Regarding the CCC's comprehensive program to provide public access to the beach, the court said:

> The Commission may well be right that that is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," by using its power of eminent domain for this "public purpose," see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it. *Nollan*, 483 U.S. at 841, 42.

Similarly, if the City of Tigard wants this property for a bike path, it must pay for it.[6] The provision of a bike path

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[6] See also, Large, *The land* [sic] *Law of Scotland - A Comparison with American and English Concepts*, 17 Envtl. L. 1, 39 (1986) (Emphasis added) ("While different parts of the United States adopt different approaches to land use regulation, they all share an important common denominator: Basic control of land use, including the power to initiate a new use of the land, is left with the landowner, subject to government's powers to modify or prevent uses that are seen as particularly harmful to a protected public interest. *Government's power to initiate projects is limited to exercise of the power of eminent domain.*" (Emphasis added.) [sic]

and a wider drainage area are hardly related to the construction of a retail plumbing store which contributes neither to bicycle traffic, nor to the need for storm drainage. That the exaction is in furtherance of public goals (regardless of their desirability), does not render an otherwise invalid exercise of the police power constitutional.

2.

The City's exaction of 7,000 square feet of Petitioner's [sic] property violates Oregon Constitution Article 1, Sec. 18.

Oregon Constitution Article 1, Section 18 states: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation." The Oregon Supreme Court has never articulated a standard by which to apply this provision to conditions or charges imposed by local governments during the land development process.

In *Hayes v. City of Albany*, 7 Or. App., 277, 285, 490 P.2d 1018 (1971) the Court of Appeals upheld a sewer connection charge imposed by the City of Albany because the charge was "reasonably commensurate with the burden imposed or reasonably to be anticipated upon the City's sewage disposal system." This standard was followed by the Attorney General when he concluded that conditions upon the rezoning of land will be upheld:

> So long as they are reasonably related to the land or development for which the exaction is required, and would serve a public purpose such as mitigating negative impacts of the proposed use. 39 Op. Att'y Gen. 467, 472 (1979).

This Board adopted the "reasonable relation" standard articulated above with respect to development exactions in the companion cases of *O'Keefe v. City of West Linn* and *Skyland Investments, Inc. v. City of West Linn*, 14 Or. LUBA 284, 293 (1986). There the landowner applied to the City for approval of a hotel and convention center development that required a conditional use permit. The permit was approved subject to the installation by the developer of significant street and traffic signal improvements. The developer appealed imposition of these conditions on the grounds that its development did not so greatly affect traffic as to justify the City placing the entire burden on its project. This Board upheld the conditions, finding them to "reasonably related" to the proposed development. 14 Or. LUBA at 293. The addition of a hotel and convention center to the City of West Linn is a project clearly related to the City's traffic management program. The exaction was reasonable because it responded to a burden created by the development.

However the development exaction at issue in this case fails the "reasonable relation" test. The construction of a larger retail plumbing facility in Tigard is not related to the City's bicycle/pedestrian pathway plan, and places no burden upon it. This facility simply does not have any impact on the number of pedestrians and bicycle riders in Tigard. Nor will this development demonstrably contribute to Fanno Creek's storm drainage requirements. The only relation is that the proposed path traverses Petitioners' property, and the proposed drainage reconstruction encroaches upon Petitioners' property.

The proposed path traverses Petitioners' property to exactly the same extent, and the 15 feet is equally necessary, in the *absence* of construction of a new store. The City has simply seized the opportunity of an application for a building permit to take Petitioners' property without paying for it. The City's attempted seizure is not constitutionally permitted.

ASSIGNMENT OF ERROR NO. 2

The City Council's exaction of all portions of Petitioners' property falling within the 100-year flood plain constitutes an unlawful taking of private property for public use, in violation of the Oregon and United States Constitutions.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 2

The exaction of the flood plain is unconstitutional under precisely the authorities and for precisely the same reasons set forth above. Petitioners refer the Board to the Argument in support of Assignment of Error No. 1. There is no valid distinction between the exaction of 15 feet for a bike path and drainage and the exaction of Petitioners' flood plain property for greenway.

The City has failed to demonstrate that the proposed greenway in the Fanno Creek flood plain is related to the construction of a larger plumbing store on Petitioners' property. The only possible relationship is that the proposed greenway will encroach upon Petitioners' property. The greenway is not envisioned to offset any identified adverse affect of the proposed development. To require a

dedication of this property for greenway as a condition to the grant of a building permit cannot be justified by the City as an exercise of its police power. Under the authority of *Nollan v. California Coastal Comm'n, supra,* this exaction violates the Fifth Amendment to the U.S. Constitution.

The exaction of Petitioners' flood plain property also violates the Oregon Constitution. The greenway is not "reasonably related" to the plumbing store or its effects or burdens, and therefore this condition fails the test articulated by this Board in *O'Keefe v. City of West Linn, supra.*

Since the condition placed upon the issuance of the permit is unrelated to any burden created by the development, the City must either abandon the condition, or pay compensation for the taking.

ASSIGNMENT OF ERROR NO. 3

The City has characterized an existing wall sign as a "roof sign." By mischaracterizing the sign, the City then establishes a requirement that the sign be removed within 45 days of occupancy of the new building which is unreasonable and hence a denial of due process.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 3

The evidence is uncontradicted that the "roof sign" in question was a part of a parapet wall constructed on the existing building in order to join three small buildings into one structure and hide unsightly roof lines. Quite reasonably, the City has required that Petitioners obtain a

demolition permit prior to razing the existing building. The City has required that Petitioners move an entire retail facility from one building to another, seek and obtain a contractor for demolition, submit the necessary paperwork for a demolition permit, await the conclusion of the review process, obtain that permit and raze the existing structure, all within 45 days of receiving an occupancy permit for the new building. This is simply unreasonable.

At a previous meeting of the Planning Commission on August 8, 1989, the Director suggested that a lag time of 90 days between occupancy and demolition would be appropriate. The City has articulated no reasonable grounds for reducing the time period by half. This condition should be modified so as to grant Petitioners a reasonable period of time to demolish the existing building and remove the offending sign.

CONCLUSION

Preservation of greenway, a bicycle and pedestrian pathway, and storm drainage improvements along Fanno Creek are all valid, even laudable, public goals. However, private landowners cannot be compelled to donate land for such purposes. Petitioners' proposal to construct a larger building on this property does not increase the need for these services to be provided or these goals to be met. Therefore, the City cannot constitutionally condition the issuance of a building permit or a requirement that they hand over the deed to a portion of their property. If

the City needs Petitioners' land to accomplish public purposes, it must pay for it.

Respectfully submitted,

KNAPPENBERGER & MENDEZ

By: /s/ Joseph R. Mendez
JOSEPH R. MENDEZ,
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Trial Attorney for
Petitioners

[Appendices reproduced, respectively, at Pet. App. G-1 and page 3 of this Joint Appendix.]

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN T. DOLAN AND FLORENCE DOLAN,	)	
Petitioners,	)	LUBA NO. 91-161
vs.	)	
CITY OF TIGARD,	)	
Respondent.	)	

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TIGARD COMMUNITY DEVELOPMENT CODES

CDC 18.32.250 ..... 19, 22

CDC 18.84.015A, E; 18.84.026 19

CDC 18.84.040.A.7 11

CDC Section 18.86.040 17

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OTHER AUTHORITIES

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I. STANDING

Respondent does not contest the standing of Petitioners John T. Dolan and Florence Dolan to file this Petition for Review.

II. STATEMENT OF THE CASE

A. Nature of Decision and Relief Sought

The land use decision which is before the Board is the disposition by the Tigard City Council of the appeal of a Planning Commission decision to approve a site development review, and approve and deny associated variances (SDR 91-0005, VAR 91-00100), subject to conditions. The Council's decision is set forth in Resolution No. 91-66 which appears in the record at pages 7-34.

The appeal by Petitioners of the Planning Commission's decision to the Council concerned the denial of requested variances which would have removed from the Planning Commission decision the requirements to (1) dedicate to the City a portion of the site located within a 100 year flood plain of the Fanno Creek Drainage Basin; (2) dedicate for pathway purposes 15 feet of the site located adjacent to the 150 foot elevation flood plain boundary; (3) remove a roof sign within 45 days of the

issuance of an occupancy permit for the new structure, and (4) eliminated the requirement of a survey at Petitioners expense for the boundaries of the dedication; and

The City Council decision eliminated the requirement for a survey of the boundaries. The portions of the City Council decision which have been appealed to this Board are the denial of requests for variances from the provisions of Tigard Community Development Code (CDC) Section 18.86.040.A.1.b., and 18.120.180.A.8. which require dedication of particular land, and Section 18.114.070.H. which prohibits roof signs of any kind.

B. Summary of Response to Assignments of Error

1. Assignments of Error 1 and 2

A condition of a land-use decision which requires the dedication of property does not effect a taking of property in violation of the Oregon and Federal Constitutions if it substantially advances legitimate state interests and the impact of the condition on the proposed development does not deny the owner an economically viable use of the land. The requirement of each constitution is essentially the same. There is no evidence in this record that the dedication required by the Tigard Code denies Petitioners an economically viable use of their land.

The State of Oregon, through ORS Chapter 197 and the adoption by the Land Conservation and Development Commission of statewide planning goals, has required the City of Tigard to regulate the use and development of land in a manner that promotes a coordinated transportation system which includes all modes of transportation,

provides recreational opportunities, and controls the quality and quantity of storm water runoff. The condition at issue substantially advances the regulation of those legitimate state interests.

Intensification of commercial development will increase demands on the City's transportation system, and the creation of additional impervious surface will increase burdens on the storm water management system.

The failure of an application in the City of Tigard to comply with all adopted standards for approval requires that the application be denied. The City of Tigard may condition the approval of an application upon subsequent actions which will insure compliance with adopted standards.

The CDC requirements of dedication of property within the flood plain, and property adjacent to the flood plain for pedestrian/bike path purposes, substantially carry out the state mandated requirements for local regulations promoting balanced transportation systems, recreational opportunities, and stormwater management.

2. Assignment of Error No. 3

Assignment of Error No. 3 essentially duplicates Assignment of Error No. 3 presented by petitioners in *Dolan v. City of Tigard*, LUBA 90-029 (Dolan I). Petitioners are precluded from raising issues in a subsequent proceeding before the Board which they raised, or could have raised, in a previous proceeding. The constitutional

issue raised in this Assignment of Error is not raised with sufficient specificity for the Board to decide the question.

C. Statement of Facts

Petitioners own a 1.67 acre parcel in downtown Tigard which is designated Central Business District on the Tigard Comprehensive Plan map and is zoned Central Business District-Action Area (CBD-AA). R 9. A 9,700 square foot retail sales building, occupied by a retail electric and plumbing supply business also owned by Petitioners, is located on the eastern edge of the subject parcel. The structure includes a large roof sign, and is adjoined by a partially paved parking lot. Fanno Creek flows along the western boundary of the site. R 10, 11.

In 1989 Petitioners applied to the City for a site development approval to replace the existing building with a 17,600 square foot retail sales building constructed on the western portion of the parcel and to pave a 39 stall parking lot. Petitioners proposed to demolish the existing smaller building after the new building is completed and the business moved into it. R 9-11.

Petitioners appealed the City's final determination on their request for site development review to this Board. Petitioners asked for a determination by the Board that certain conditions of approval concerning property dedication and sign removal constituted an unconstitutional taking of property without compensation. This Board in *Dolan v. City of Tigard*, LUBA No. 90-029, decided January 24, 1991, determined that before Petitioners could present their claims concerning constitutional violations with regard to the dedication requirements they first needed to

seek a variance to the code requirements through an available variance procedure. The Board denied assignment of error 3 which alleged that the sign removal condition constituted an unconstitutional taking of property.

Petitioners submitted another application for site development review approval for the same proposed development that was considered in Dolan I. In addition, they asked for variances to CDC Sections 18.86.040.A.1.b. and 18.120.180.A.8. which require dedication of land located within the 100 year flood plain and of land adjacent to the flood plain which is at a suitable elevation for construction of a pedestrian/bicycle pathway. R 158-160. They asked for a variance from the requirements of CDC Section 18.106.030.C.20. requesting a reduction in the required number of parking spaces from 44 to 39. The variance of the parking requirements was granted and is not an issue in this proceeding. Finally, a variance was requested from the provisions of Section 18.114.070.H. which prohibits roof signs of any kind within the City. R 8-9. The City Planning Director approved Petitioners' site development. review and imposed 16 conditions of approval. R 123. Petitioners appealed the Planning Director's decision to the Planning Commission challenging four of the conditions of approval. R 100-101. The Planning Commission deleted one condition of the Planning Director's decision dealing with the payment of traffic impact fees and denied the other portions of the appeal. R 82, 85, 58-85. Petitioners appealed the decision to the City Council challenging four of the conditions, including the two conditions which are at issue in this proceeding – which read as follows:

"1. The applicant shall dedicate to the City as greenway all portions of the site that fall within the existing 100 year flood plain (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot flood plain boundary. The building shall be designed so as not to intrude into the greenway area. This condition shall be met prior to the issuance of building permits.

"15. The existing roof sign shall be permanently removed from the subject property within 45 days of the issuance of the occupancy permit for the new building." R 56, 82-83, 85.

Petitioners in their appeal before the City Council also objected to the requirement that, at their expense, they survey and locate the boundary of the flood plain. R 56. After public hearing, the City Council allowed the appeal in part, denied it in part and modified the Planning Commission's decision. The Council's decision is set forth in Resolution No. 91-66. R 7-34. The City Council modified the Planning Commission's decision by deleting the requirement that the applicant be required to locate the flood plain boundary. The City Council adopted as its own the Planning Commission's Findings of Fact, Analysis and Conclusions with that one modification. R 7.

III. BOARD JURISDICTION

The decision of the Tigard City Council set forth in Resolution No. 91-66 is a final decision made by a local government concerning the application of a land use regulation. The Board has jurisdiction to review this land

use decision pursuant to ORS 197.825(1), 197.015(10)(a)(A)(iii).

IV. RESPONSE TO ASSIGNMENTS OF ERROR

A. Response to Assignments of Error 1 and 2

Petitioners combine their argument on Assignments of Error No. 1 and 2. Pursuant to OAR 661-10-030(3) (d), Respondent will likewise address Assignments of Error No. 1 and 2 in one combined argument.

Petitioners allege only that condition 1 of their site development review approval, which requires dedication of land within the 100 year flood plain and the portion of land lying 15 feet east of the 100 year flood plain boundary, constitutes an unlawful taking of property in violation of Petitioners' rights protected by the Oregon and Federal Constitutions.

Petitioners do not assign as error the City's interpretation or application of the variance criteria set forth in CDC 18.134.050. Petitioners do not challenge the City's authority to enact the regulations which require the dedication of land or the application of those regulations to this site. Petitioners do not challenge the evidentiary support for the City's decision.

The sole issue presented by Assignments of Error No. 1 and 2 is whether the imposition of the condition 1 requiring dedication of property results is a deprivation of property without compensation in violation of the protections found in Article 1, Section 18 of the Oregon

Constitution and the Fifth Amendment to the U. S. Constitution as applied to the City through the Fourteenth Amendment.

Petitioners claim that the condition imposed by the City violates both the Oregon and Federal Constitution. While the analysis under each constitution is essentially the same, the Oregon Supreme Court has not directly addressed a physical taking claim in the context of a land use approval. For that reason each analysis will be taken separately.[1]

1. Oregon Analysis

The Oregon Supreme Court has not dealt directly with a case similar to the facts presented in this matter. The Oregon Supreme Court has considered the application of Article I, Section 18 of the Oregon Constitution in the context of alleged taking claims due to the enactment of planning and zoning ordinance provisions. The

[1] The Oregon Supreme Court has held that the "basic thrust" of the Fifth Amendment to the Federal Constitution and Article I, Section 18 of the Oregon Constitution "is generally the same." *Suess Builders Co. v. Beaverton*, 294 Or 254, 259, 656 P2d 306 (1982). It has also noted that, while the criteria for determining whether a compensable taking has occurred under the Federal Constitution are not necessarily the same as those under the State Constitution, the Court has never addressed those possible differences. *Id.* The Oregon opinions have relied upon Oregon and Federal constitutional case law interchangeable [sic]. *See*, e.g., *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 608-614, 581 P2d 50 (1978); *Schoonover v. Klamath County*, 105 Or App 611, 806 P2d 156 (1991); *Department of Transportation v. Lundberg*, 100 Or App 601, 604-605, 788 P2d 456 (1990).

Supreme Court has stated the rule for analyzing takings under Article I, Section 18 of the Oregon Constitution to be that no taking has occurred unless the owner is precluded by the application of the subject land use regulation from all economically feasible private uses or that the regulation designation results in such governmental intrusion as to inflict virtually irreversible damage. *Fifth Avenue Corp. v. Washington County*, 282 Or 591, 581 P2d 50 (1978).

The Supreme Court followed and applied the analysis set forth in *Fifth Avenue* in a case involving an alleged taking due to the designation of a site as a future park. *Suess Builders Co. v. City of Beaverton* 294 Or 254, 656 P2d 306 (1982). The Supreme Court also applied the *Fifth Avenue* analysis in *Dunn v. City of Redmond*, 303 Or 201, 735 P2d 609 (1987), a case involving an alleged taking due to the designation of property for open space purposes. The Supreme Court's analysis in these three cases was recently applied by the Court of Appeals in *Schoonover v. Klamath County*, 105 Or App 611, 806 P2d 156 (1991).

The *Schoonover* case involved an alleged unconstitutional taking of property due to the imposition upon a subdivision approval of a condition dealing with the provision of fire protection through annexation to a fire district. The Court held that the imposition of the condition did not preclude the use of the property and did not deny the owner an economic use. All four of these cases deal with use restrictions and not dedication requirements and therefore differ factually from this case.

The evidence in this record establishes that the 17,600 square foot proposed structure and associated 39 stall

parking lot can be accommodated on the site as proposed by the applicant. Mr. Dolan told the Tigard Planning Commission that he was flexible concerning the exact location of this building on the site as long as he is justly compensated for the dedicated land. R 88. The requirement for the dedication of property does not deny Petitioners an economically viable use of their land. They have determined that the expansion is a viable use, and the site can accommodate the proposed use after dedication.

Two cases which deal with sidewalk dedication requirements have been decided by the Oregon Court of Appeals. In *Martin v. City of Lake Oswego*, 69 Or App 170, 684 P2d 28 (1984), the decision of the city to condition the issuance of a building permit to enlarge an existing office building with a requirement that the property owner grant an easement or dedication for sidewalk purposes was challenged as an unconstitutional taking of property without compensation.

As in this case, the petitioners in *Martin* did not challenge the city's evidentiary findings or conclusions concerning the application of its city code provisions which required dedication. Also, as in this case, the petitioner did not contest the city's authority to require the dedication of land as a condition of granting the requested permit.

The Court of Appeals in *Martin* concluded that the evidence in the record established that the city's concern about the impact of future development on its streets, particularly in developing industrial areas, was a sufficient reason to abide by its own city code and require the

dedication. The court further concluded that the city adequately demonstrated in its decision that future use required the dedication as a condition of all development on collector streets and that such a requirement was well within the city's regulatory and constitutional authority.

The office building in that case was a 1,000 square foot building located on a collector street which the petitioner sought to expand by 685 square feet. The expansion, according to petitioner, would not add any employees but only enlarge the work space available for the existing work force, which constituted at that time four employees. *Martin v. Lake Oswego*, 8 Or LUBA 95, 96 (1983). The city argued that it had established within its comprehensive plan and code a comprehensive set of regulations and requirements to assure that development was served by adequate public facilities and services. The Court of Appeals concluded that the City had demonstrated that the proposed future use required dedication as a condition of development, that the City had established an adequate regulatory scheme and that it was within its constitutional authority to impose the dedication condition.

The Tigard Development Code has a similar complete and comprehensive set of provisions which provide authority for the imposition of the dedication condition. The bicycle/pedestrian path is called for in the general location along Petitioners' property in the City of Tigard's parks master plans and the Tigard area comprehensive pedestrian/bicycle pathway plan of 1974. In addition, CDC Section 18.120.180.A.8 requires that where development is allowed within or adjacent to the 100 year flood plain, the City shall require the dedication of sufficient

open land area adjoining or within the flood plain to accommodate the pathway shown on the pedestrian/ bicycle plan. The City's sensitive lands provisions, CDC Chapter 18.84, similarly requires the dedication of land within the 100 year flood plain. CDC 18.84.040.A.7. This section implements provisions of Tigard comprehensive plan policy 3.2.4 which requires dedication of undeveloped land within the 100 year flood plain. These requirements are based upon studies referenced in Volume 2 of the plan at section 3.2 and the master drainage plan for the City produced by CH2M Hill in 1981, concerning the need for public management of the storm water drainage system and for measures intended to increase flow efficiency of Fanno Creek and other drainage channels in the City.

Finally, the City's master plan for Fanno Creek Park identifies a portion of the Fanno Creek drainage area within the 100 year flood plain as ultimately being included within the Fanno Creek Park. Dedication of property within the 100 year flood plain for storm management purposes and the 15 feet adjacent to the 100 year flood plain for transportation system purposes has the collateral benefit of assisting in the implementation of the City's park master plan.

In *Dept. of Transportation v. Lundberg*, 101 Or App 601, 788 P2d 456 (1990), *rev. allowed*, 310 Or 393, 798 P2d 672 (1990), the Court of Appeals rejected an argument by the property owner that the City of Portland's ordinance requiring street dedication was an unconstitutional enactment. The owner contended first that the ordinance was unconstitutional on its face. The Court of Appeals held that the enactment of an ordinance does not constitute a

taking unless it denies an owner all economically viable use of their land. The Court cited *Martin* for the proposition that it had previously upheld a similar sidewalk dedication ordinance against the constitutional challenge. Again the Court looked at the evidence in the record and concluded that the owner had not shown that the ordinance deprived him of an economically viable use of his property.

In this case there is no taking of Petitioners' property in violation of Article I, Section 18 of the Oregon Constitution because the City of Tigard has enacted a complete regulatory framework to control development which requires the provision of adequate facilities and services to support development. Condition 1 implements that regulatory scheme. The impact of the dedication requirement does not deny Petitioners an economically viable use of their property.

2. Federal Constitutional Analysis

A land use regulation does not constitute a taking so long as it substantially advances a legitimate state interest and does not deny the property owner economically viable use of their land. *Nollan v. California Coastal Commission*, 483 US 825, 97 L Ed2d 677, 107 S Ct 3141 (1987). When the land use regulation results in a requirement that the owners of property either dedicate land or allow public access to private land the government's requirement must advance that legitimate state interest and there must be a sufficient relationship between the requirement of dedication and the governmental interest which is being advanced. *Nollan* at 836.

The State of Oregon has concluded that the uncoordinated use of land threatens the orderly development and environment and the health, safety, order, convenience and prosperity and welfare of the people of the state. The promotion of coordinated statewide land conservation and development requires the creation of the statewide planning agency to prescribe planning goals and objectives to be applied by cities throughout the state. ORS 197.005. The statewide planning goals enacted by the Land Conservation and Development Commission (LCDC) constitute mandatory statewide planning standards that must be applied and implemented by local governments through their comprehensive plans and implementing regulations. ORS 197.015(3), (5), (8); ORS 197.175(1), (2).

The State of Oregon, through the adoption of provisions of ORS Chapter 197 and the implementation of the requirements of that chapter by LCDC, has articulated a legitimate state interest in the coordinated and planned development and use of land within the state.

The LCDC has carried out its responsibilities under Chapter 197 through the adoption of the statewide planning goals. OAR 660, Div. 15. Of particular applicability in this matter are Goals 5, dealing with open space, scenic and historic areas, and nature resources; Goal 8, dealing with recreational needs; Goal 11, dealing with public facilities and services and Goal 12, dealing with transportation.

Goal 5 requires cities to conserve open space in order to protect nature and scenic resources. Cities must develop programs that will insure open space, promote

healthy and visually attractive environments in harmony with natural landscape character, protect natural resources for future generations and identify and manage natural resources such as water areas, wetlands, watersheds and ground water resources. In the guidelines for Goal 5, cities are directed to plan development so that needed amounts of open space are conserved and that natural resources and the physical limitations of land should be used as a basis for determining a quantity, quality location of rate and type of growth in the city's planning area. Goal 8 requires that the city develop plans and programs to satisfy the recreational needs of the citizens of the state through the siting of necessary recreational facilities.

Goal 11 directs that cities plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development. Development is to be directed to urban areas and cities are to plan for the provision of these facilities and services through the development of public facilities plans which describe facilities which are needed to support the land uses designated in the comprehensive plan.

Goal 12 directs that the city develop a transportation plan which shall consider all modes of transportation, including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian. LCDC has recently implemented Goal 12 through the adoption of the transportation planning rule. OAR Ch 660, Division 12. Provisions of that rule specifically address the inclusion of bicycle and pedestrian transportation facilities within the transportation system plan. Local governments are required to

adopt land use regulations which require the planning and provision of bicycle facilities providing safe and convenient pedestrian and bicycle access through commercial and industrial areas. OAR 660-12-020(2)(d); 660-12-045(3), (6).

A broad range of governmental purposes have been recognized as legitimate in the context of regulatory takings cases. Those legitimate purposes include protection against "air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards to geology, fire and flood and other demonstrated consequences" of development. *Agins v. Tiburon*, 447 US 255, 261 n.8, 65 L Ed2d 106, 100 S Ct 2138 (1980). They also include preservation of landmarks, *Penn Central Transportation Co. v. New York*, 438 US 104, 129, 57 L Ed2d 631, 98 S Ct 2646 (1978); preservation of surface water drainage to protect public safety, *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 US 470, 485-86, 94 L Ed2d 472, 107 S Ct 1234 (1987); preservation of open spaces where "the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 US 1, 9, 39 L Ed2d 797, 94 S Ct 1536 (1974).

Given the breadth of these governmental purposes already recognized as legitimate, the Board should recognize that the purposes of the LCDC goals are also legitimate governmental purposes.

The City has implemented these state mandated requirements through its Comprehensive Plan and the implementing provisions of the Tigard Development Code. As support for the policies in the Comprehensive

Plan, the City has also undertaking studies and developed plans for its transportation system, its drainage system and its park system. The Council decision, at R 15-31, sets forth in detail a description and analysis of the requirements of the plan Code and the supporting documentation.

CDC Section 18.86.040 requires that development within the action area overlay zone must address transportation system requirements and facilitate pedestrian and bicycle circulation. R 16-17. Subsection (b)(i) of that section requires the dedication and construction of pedestrian bike paths such as the one required by condition 1, which are identified in the Comprehensive Plan.

In addition, CDC Section 18.120.180.A.8. requires that where development is allowed within or adjacent to the 100 year flood plan, the City shall require dedication of sufficient open land area for greenway adjoining and within the flood plain in accordance with the adopted pedestrian/bicycle plan. A small portion of the western edge of the site is within the 100 year flood plain of Fanno Creek. *See* Exhibit 37, large sheets, sheet 1, site plan. The Council found that the dedication is related to the applicant's request to intensify development of this site with general retail sales uses, at first, and other uses to be provided by Phase II at a later date. R 20. The Council found that it was reasonable to expect that customers and employees of future uses of the site could utilize a pedestrian/bicycle pathway adjacent to the development for their transportation and recreation needs. In fact, the site plan has provided for bicycle parking and a rack in front of the proposed building to provide for the parking and storage needs of the facility's

customers and employees. R 20. The Council concluded it was reasonable to expect that some of the users of the bicycle parking provided by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. The Council, at R 20-22, explains the linkages between dedication requirement and supporting data in the comprehensive plan.

There is similar support in the City's Comprehensive Plan and implementing regulations for the requirement of the dedication of the property within the 100 year flood plain for greenway and storm drainage management purposes. This portion of the City Council's decision is explained at R 27-31.

In summary, the dedication requirement within the flood plain serves two purposes which implement the state-wide planning goals and further a legitimate state interest. First, the requirement insures the maintenance of a greenway within the Fanno Creek flood plain which promotes the recreational needs of the citizens and, secondly, the Fanno Creek drainage is an integral part of the City's master drainage plan. The dedication of the flood plain area incorporates into public management these portions of the storm water drainage system. That system, as described in the master drainage plan produced by CH2M Hill, is in need of construction and upgrade to increase the flow and efficiency of the drainage system in order to accommodate planned growth.

The property within the 100 year flood plain is of limited economic value to Petitioners due to the fact that property within a 100 year flood plain is subject to severe development restrictions. *See* CDC 018.84.015A, E;

18.84.026. Additionally, the City will allow the area within the 100 year flood plain to be counted towards the 15% landscaping requirement for developments within this particular zone. R 23. Counting the total site area in the flood plain before dedication toward the 15% landscaping requirement of the zone frees the rest of the site for use for building or parking lot uses. Through dedication to the public, the City will assume maintenance and liability for this drainage channel, removing those economic burdens from Petitioners. By removing this portion of unbuildable land from the tax rolls, there will be an added economic benefit enjoyed by Petitioners through reduced value of the site and therefore reduced property tax liability.

Petitioners do not challenge the evidentiary support for the City's decision. The City cannot approve the requested site development approval without the imposition of a condition of dedication required by its Code. The City may impose conditions to carry out provisions of the plan and development Code. All development applications must comply with applicable standards. CDC 18.32.250.

Petitioners' main contention is that the City has failed to establish a direct linkage between this particular development and the required dedication. Petitioners argue that the *Nollan* case requires the City to establish a direct and empirical relationship between the demands created by a particular development and the extent of exactions. Such a precise and empirical fit is not required by the *Nollan* decision, nor should it be imposed by this Board. The linkage required by *Nollan* is between the articulated state interest and the condition.

The Supreme Court stated in *Nollan* that there are a broad range of governmental purposes and regulations which satisfy the Court's requirement that a regulation substantially advance legitimate state interests. The Court refers to landmark preservation, residential zoning, and scenic zoning as examples. 483 US at 835. The Court goes on to say that the California Coastal Commission unquestionably would be able to deny the Nollans a permit to build their house outright if their house "alone or by reason of cumulative impact produced in conjunction with other construction" would substantially impede such a legitimate governmental purpose articulated through a government regulation. There can be no question that the governmental purposes articulated in ORS Chapter 197 and implemented through the statewide planning goals and the City's Comprehensive Plan and Code are the type of legitimate state interests to which property owners can be subjected.

The Petitioners do not challenge the City's findings, at R 28, that increasing the intensity of this existing commercial development results in the creation of additional impervious surface (building coverage and parking lot), and therefore causes a greater impact upon the City's storm drainage system. Petitioners do not challenge the evidentiary support for the Councils [sic] findings, at R 20, that an increase in size of a commercial activity will result in an increased impact on the City's transportation system. The dedication requirements created by the City's Code are designed to assist the City in providing a timely, orderly and efficient arrangement of public facilities and services in this urban area in order to accommodate

development of not only the Petitioners' site but of other urban land within the jurisdiction of the City of Tigard.

The City code places upon each property owner the burden of participating in the provision of these public facilities and services as they develop their property. The alternative is for all property owners to wait until the services are provided by other means before development could occur. All properties are not equally situated. Some property will bear a different burden than others in the process of completing the urbanization of the City. These policy choices have been made by the City Council and are choices properly made through the political process. Petitioners dissatisfaction with these political choices are appropriately resolved through the political process through the changing of the laws of the City and state and not through resort to this Board and the court system.[2]

The City's Comprehensive Plan and implementing regulations are designed to accommodate planned land uses over time and provide adequate public facilities and services to those planned land uses. The United States Constitution does not prevent the Tigard City Council from making these choices and regulating development in the manner that it has chosen.

What the *Nollan* opinion states is required by the Fifth Amendment is a linkage or "nexus" between a

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[2] The Ninth Circuit has recognized the political process as the appropriate forum for resolution of a grievance by a property owner of unequal treatment through application of a regulation that falls short of a taking. *Citizen's Ass'n of Portland v. Intern. Raceways*, 833 F2d 760 (9th Cir 1987).

permit condition which serves a legitimate state interest and a regulatory basis for which the application could be denied. If the California Coastal Commission had in place a regulation which was designed to protect the public's ability to view the beach, a condition which protected that public interest would be constitutional. Such a

> ". . . condition would be constitutional even if it constituted a requirement that the Nollans provide a viewing spot on their property for passers by with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." *Nollan*, 483 U.S. at 836.

In this case, the Petitioners' request for a development approval must be denied if all requirements of the City's Code are not satisfied. CDC 18.32.250. The dedication of land to allow improvements to the transportation system, the Fanno Creek Greenway and storm water management system are directly related to demands placed upon those systems through intensification of commercial development that will result from Petitioners' development. The essential linkage is therefore made between the condition and the governmental purpose to be served by the condition. Petitioners' development

which will result after the dedication condition is satisfied is economically viable because it is the same development which is proposed by Petitioner through the original development application, and there is no evidence in the record to the contrary.

The 9th Circuit recently analyzed the connection requirement in *Nollan* in the context of a development within the Tahoe Regional Planning Agency area of responsibility. *LeRoy Land Development v. Tahoe Regional Planning Agency*, 939 F2d 696 (9th Cir. 1991).[3] In that case, a development was conditioned upon the provision of mitigation measures (on and off-site) designed to minimize the adverse effects of urbanization on the Lake Tahoe Basin's ecological systems. Those requirements included installation of storm water dissipater devices, stabilization devices for cut slopes, the acquisition of adjacent and nonadjacent lands for open space and the mitigation of additional items identified in the environmental impact statement.

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[3] There are numerous other federal cases which apply *Nollan*. However, most concern the application of a use restriction and not a dedication requirement. *See* e.g., *Commercial Builders of Northern California v. City of Sacramento*, 941 F2d 872 (9th Cir 1991); *Kaiser Development Co. v. City and County of Honolulu*, 913 F2d 573 (9th Cir 1990); *Associated Builders v. Baca*, 769 F Supp 1537 (ND Cal 1991); *McNulty v. Town of Indialantic*, 727 F Supp 604 (MD Fla 1989). One case deals with a dedication requirement and the analysis is similar to that set forth in *LeRoy Land*. *See Moore v. City of Costa Mesa*, 886 F2d 260 (9th Cir 1989) (condition requiring street dedication of 10% of parcel for street widening stated insufficient claim for unconstitutional regulatory taking).

The Federal District Court for the District of Nevada held that the off-site mitigation provisions were not reasonably related to the agency's purpose of mitigating adverse environmental effects caused by construction. This was because the provisions required off-site measures to stabilize the land of third parties.

The 9th Circuit disagreed and concluded that under *Nollan* the government may impose land use regulations so long as the regulations substantially advance legitimate government interests and do not deny the owner economically viable use of the land, 936 F2d at 699. The Court stated that in *Nollan* the Supreme Court examined the nexus between the asserted government interest (beach view) and the agency's condition (beach easement) and concluded that the condition failed to further that stated government interest. In *LeRoy Land*, however, the 9th Circuit found the relationship between the mitigation provisions and the Tahoe Agency's regulations to be clear. The Court found of particular importance in the Agency's scope of authority its charge to preserve Lake Tahoe's water quality. The plaintiff's property constituted an erosion hazard and its impervious surface exceeded the Agency's limits. The Court found that the off-site mitigation provisions ameliorate adverse environmental effects caused by the development and this directly furthers the governmental interest underlying the agency's regulations. *LeRoy Land Development v. Tahoe Regional Planning Agency*, 939 F2d at 699.

In the case before the Board, there is a similar linkage between the requirement that the City plan and provide for an adequate transportation, and storm water management system, and the imposition of a condition on an

intensification of commercial activity which requires the dedication of land to provide facilities for both transportation and storm water management systems.

B. Response to Assignment of Error No. 3

Assignment of Error No. 3 reads as follow [sic]:

> "The City has characterized an existing wall sign as 'roof sign' by mischaracterizing the sign, the City then establishes a requirement that the sign be removed within 45 days of occupancy of the new building which is unreasonable and hence a denial of due process."

Assignment of Error No. 3 in the Petition for Review brought in LUBA Case No. 90-029 reads as follows; [sic]

> "The City's requirement that 'roof sign' be removed within 45 days of occupancy of the new building was unreasonable and hence a denial of due process."

The argument in support of Assignment of Error No. 3 in the Petition for Review is exactly the same as the argument presented in the Petition for Review in LUBA Case No. 90-029 with the exception of references to the record in this matter in the last paragraph of argument on page 16 of the Petition for Review. This Board in the final opinion and order in LUBA Case No. 90-029 denied the Third Assignment of Error. The denial was based upon the fact that there was no argument supporting an allegation of unconstitutionality being provided in the Petition for Review. *Dolan v. City of Tigard*, LUBA No. 90-029, Final Opinion and Order at p. 22. This Assignment of Error

should be denied on the same basis that it was previously denied in LUBA Case No. 90-029.

In addition, this Board has consistently refused to reconsider issues raised in a subsequent proceeding where they were raised and decided or could have been raised and decided in a previous proceeding. *Portland Audubon Society v. Clackamas County,* 14 Or LUBA 433 (1986), *Urquhart v. City of Eugene,* 16 Or LUBA 102 (1987), *Standard Insurance Co. v. Washington County,* 16 Or LUBA 717 (1988) at pp. 725, 726, *Nelson v. Clackamas County,* LUBA No. 89-151 (1990). The only new language in this Assignment of Error alleges that the sign is "mischaracterized" by the City. That issue could and should have been raised in Dolan I. This Assignment of Error should be denied.

V. CONCLUSION

The provisions of the Tigard Comprehensive Plan and Development Code implement a system of land use regulation required by the State of Oregon which constitutes a legitimate exercise of governmental authority. The City Code requires the Petitioners to dedicate property for transportation system, storm water management system and park purposes before the site can be developed. The application must be denied if that dedication of property does not occur. The condition requiring dedication carries out the City Code requirements. The proposed intensification of use will have an impact on the affected systems. There is no evidence in this record that Petitioners are not left, after the dedication occurs, with an economically viable use. The City's decision does not

effect a taking of property from Petitioners in violation of the Oregon and United States Constitutions.

O'DONNELL, RAMIS, CREW & CORRIGAN

By: /s/ James M. Coleman
James M. Coleman,
OSB #76101
Of Attorneys for Respondent

CERTIFICATE OF FILING

I hereby certify that on January 3, 1992, I filed the original of this RESPONDENT'S BRIEF, together with four copies, with the Land Use Board of Appeals, Suite 220, 100 High Street, S.E., Salem, Oregon, 97310, by first class mail.

DATED this 3rd day of January, 1992.

O'DONNELL, RAMIS, CREW & CORRIGAN

By: /s/ James M. Coleman
James M. Coleman,
OSB #76101
Of Attorneys for Respondent
City of Tigard

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 1992, I served a true and correct copy of the foregoing RESPONDENT'S BRIEF by first class mail on the following persons:

David B. Smith
Attorney at Law
P. O. Box 230637
Tigard, OR 97223

Joseph R. Mendez
Knappenberger & Mendez
1318 S.W. 12th Avenue
Portland, OR 97201

DATED this 3rd day of January, 1992.

O'DONNELL, RAMIS, CREW & CORRIGAN

By: /s/ James M. Coleman
James M. Coleman,
OSB #76101
Of Attorneys for Respondent
City of Tigard

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JOHN T DOLAN Petitioner FLORENCE DOLAN Petitioner v. CITY OF TIGARD Respondent	)	ORDER DENYING RECONSIDERATION CA A73769 SC S39393

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has on July 29, 1992, denied the petition. ORAP 9.15. The Supreme Court may now proceed to determine whether to grant review. The Appellate Court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 14.05.

/s/ GEORGE M. JOSEPH
CHIEF JUDGE

COPIES TO:

DAVID B SMITH	Attorney for Petitioner
JAMES M COLEMAN	Attorney for Respondent

This computer-generated case caption may not comply with ORAP 2.05(1) & 5.05(5b).

PETITIONS FOR REVIEW

ALLOWED AND DENIED

(840 P2d 1295, 1296)

ALLOWED

October 27, 1992

Caplener v. United States National Bank (A65555)(S39422)(112 Or App 401)
Dolan v. City of Tigard (A73769)(S39393)(113 Or App 162)
Perez v. Bay Area Hospital (A66877)(S39242)(112 Or App 288)
State ex rel Kirsch v. Curnutt (A67772)(S39484)(113 Or App. 539)
State v. Davis, Dennis John (A68411)(S39509)(113 Or App. 118)
State v. Person, Gerald Oscar (A67862)(S39464)(113 Or App 40)
State v. Peterson, Herman William (A64607)(S39501)(114 Or App 126)
State v. Trueax, Michael A. (A68887)(S39353)(113 Or App 384)
State v. Wacker, Bart Dale (A62171)(S39421)(111 Or App. 483)

DENIED

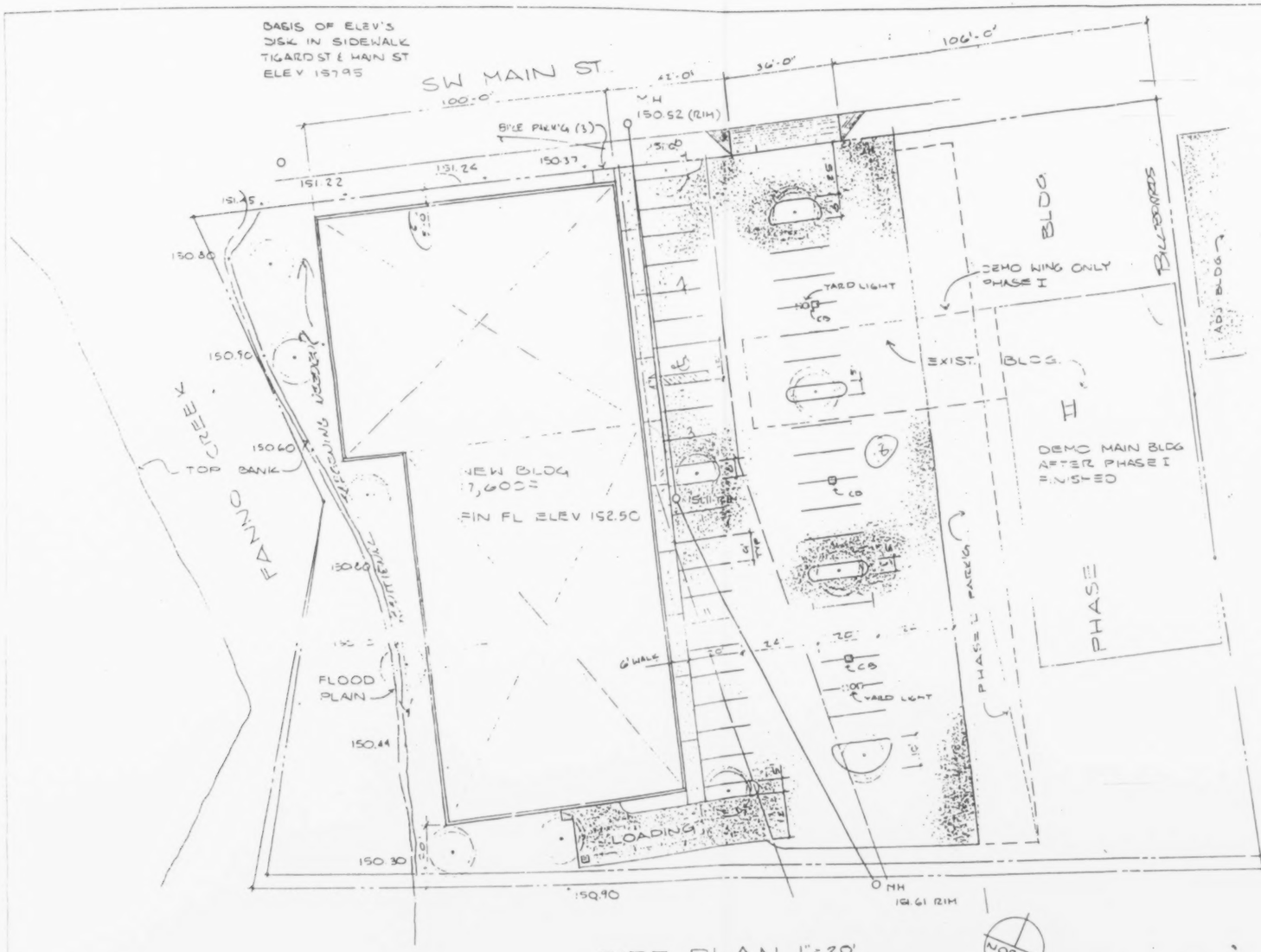
October 27, 1992

Adcox v. Gencor Industries, Inc. (A69725)(S39486)(113 Or App 399)
Allen and Allen v. Children's Services Division (A70185)(S39450)(113 Or App. 751)

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Allen v. Gallagher (A70181)(S39448)(113 Or App 751)
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Benton, Robert S. v. Maass (A72378)(S39469)(113 Or App 474)
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Firth v. Burdell (A70780)(S39555)(114 Or App 233)
Fullerton v. Santos (A69123)(S39574)(113 Or App 751)
Giesy, Reid C. v. Board of Parole (A65240)(S39470)(113 Or App 474)
Gilbert, George D. v. Board of Parole (A67074)(S39460)(113 Or App 474)
Gilkey v. SAIF (A69991)(S39517)(113 Or App. 314)
Goodell v. Escobar (A71311)(S39577)(114 Or App 233)
Gordon, Dennis Leroy v. Board of Parole and Post-Prison Supervision (A69418)(S39398)(113 Or App 233)
Halstead, Sharon L. v. Board of Parole (A67400)(A67508)(S39461)(113 Or App 474)
Jack Gray Transport, Inc. v. Ervin (A66490)(S39512)(113 Or App 742)
Leitz v. Thorson (A68007)(S39491)(113 Or App 557)
McDonald v. United States National Bank of Oregon (A66109)(S39540)(113 Or App 113)
McElhaney, Eldon Wayne v. Board of Parole and Post-Prison Supervision (A71897)(S39391)(112 Or App 661)
McKay v. Maxwell (A66303)(S39520)(113 Or App 233)
Miller v. City of Dayton (A73904)(S39416)(113 Or App 300)

Morrow, Robert Glenn v. Board of Parole (A70344)(S39497)(113 Or App 752)
Neher and Zajac v. Tektronix, Inc. (A66308); Sherbeck v. Tektronix, Inc. (A66248)(S39405)(113 Or App 399) (Zajac's petition)
Neher and Zajac v. Tektronix, Inc. (A66308); Sherbeck v. Tektronix, Inc. (A66248)(S39493)(113 Or App 399) (Sherbeck's petition)
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Reeser v. Long (A66888)(S39308)(112 Or App 636)
Sheppard v. Kaiser Cement Corp. (A70695)(S39602)(114 Or App 151)

BEST AVAILABLE COPY



SITE PLAN 1" = 20'

NORTH

PHASE I PHASE II

SITE STATISTICS

AREA	71,500$^{\#}$±	= 100%
PHASE I	= 29,000$^{\#}$±	39%
BLDG	= 17,600$^{\#}$	40%
PAVING	= 20,200$^{\#}$±	4%
WALKS	= 1,820$^{\#}$	21%
LANDSCAPE & NATURAL	10,380$^{\#}$±	

TAX LOT 700 LOCATED IN THE SW ¼ OF NE ¼ SECTION 2 T2S - R1W (21-2-AC)

CONST TYPE - V-N
OCCUPANCY - B 2
(RETAIL/WHSLE SALES, WHSE)

GENERAL NOTES & SPEC'S

JOB # 88037 FEB. 20, 1989

1. Verify & confirm all existing conditions and dimensions prior to fabrication or construction. Notify & coordinate any changes with engineer before proceeding.

2. DESIGN LOADS:
   A) Roof LL = 25 psf
   B) wind load 80 mph (B) UBC
   C) seismic zone 2
   D) soils capacity = 1500 psf

3. Footings to rest on firm natural undisturbed soil; free of organics or other deleterious material 12" min. below orig./final grade. Over excavate as required if necessary to firm bearing. Compacted crushed rock may, with engineer's's appv'l, be used to bring up grade to orig. intended level.

4. Concrete to be f'c = 3000 psi @ 28 days (min). Protect all concrete from inclement weather and impact until sufficient strength is developed to prevent damage.

5. Reinforcing to be ASTM Gr 40 (deformed) except as noted.

6. Concrete masonry units to comply with ASTM C-90 grade n, type 1 (half & half) with moisture content not to exceed 30 % of total absorption. Protect and maintain dryness until laid in wall.

7. Mortar shall be type 'S' ASTM C-270 (assumed f'c = 2500)

8. Grout to be F'c = 3000 psi @ 28 days with 1/2" max aggregate size & 9" slump. Grout fill all cells containing reinf., embeded items, or below grade.

9. Typical wall reinforcing to be:
   A) #5 @ 4'-0" o/c, wall ends & corners (vert)
   B) #5 @ 4'-0" o/c, tops of wall, bot of wall & as shown or indicated on dwg's (horiz)
   C) (2) # 5 around and 24" (min) past all opn'gs. (UON)

10. Steel to be:
    A) plates & open sections, ASTM A-36
    B) tubes, ASTM A-500
    C) bolts, ASTM A-307
    D) welds, AWS E-70 (1/4" UON)
    E) All steel to have a shop coat of rust inhibiting primer & be coated with a asphaltic emulsion where below grade.
    F) Fabricate & erect steel according to AISC spec's.

11. All nails to be "common" or galv. (hot dip only) box. Except roof sheathing to be "ringshank". No "sinker" nails allowed.

12. All wood in permanent contact with masonry or concrete to be pressure treated per req's of ASTM D-1760. Roof ledgers 4x10 & larger may be protected with 55# felt or galv sheet metal smaller members must be treated.

13. "x" brace all joists @ 8'-0" max o/c and solid block over all bearng points. fire block all stud walls at 10'-0" (max) o/c, at ceilings and roofs.

14. Lumber grades:
    A) stuos, #2 & btr DF-L (KD)
    B) plates & blocking, #2 & btr DF-L
    C) joists and ledgers, #2 & btr DF-L
    D) headers & beams, #1 & btr DF-L (UON)
    E) Lam's, Fb=2400, Fv=145, Fc⊥=455 DF (industrial) with exterior glue, Lbad wrap. Radius = 2000' (simp span) (no camber on cantilever beams).
    F) Roof sheathing to be APA 42/20 (ext) plywood, OSB, or "COMPLY". Nail sht'g with 8d @ 6" o/c along panel edges and 12" o/c along interior supports. Solid block edges within 12' of walls and be aligned with building "stop".

15. Roofing to be Owens Corning # 33-IC with white cap sheet (UL CLASS A).

16. Fascia metal to be ECI #M1005 "slim rib" 26 ga as mfg'd by Engineered Components Inc. Tualatin, OR. Installed according to the Mfr's instructions. (Or approved eq.) provide flashing etc color matched to complete.

17. Insulation to be:
    A) floor, 2" "blue board" @ perimeter.
    B) walls, (NA)
    C) roof, R-19 rigid (at heated areas only)

18. Glazing to be in accordance with Ch 54 (all) UBC and be safety glazed when in or within 1'-0" of doors, or other hazardous locations and/or as req'd by UBC.

19. Restroom finishes:
    A) floor, sheet vinyl
    B) base, 6" rubbeer
    C) wainscots, plast laminate on WR gyp. bd.
    D) wall, enamel on WR gyp. bd.
    E) ceil, enamel on gyp. bd.

MECHANICAL, ELECTRICAL & PLUMBING BY SEPERATE PERMIT. Mech. to provide (15) cfm / occupant & (8) air changes / hr in restrooms.

ALBERT R. KENNEY, JR. PE
CONSULTING ENGINEER/PLANNER
(503) 246-9611 FAX 244-5017
236-1551 OR 682-0491

A PROPOSED BLDG For
MR JOHN DOLAN &
A-BOY STORES/GLOBE LIGHTING

DATE 4-22-88
5-8-89

JOB NO 85037

Planning Comm. 5/8/89 SDR 89-13

1

Supreme Court, U.S.
FILED
JAN 13 1994

No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Where the Dolans applied to expand their small plumbing and electrical supply store in downtown Tigard, Oregon, and that expansion neither received any special municipal benefits nor created any specific, quantifiable, demonstrable burdens on municipal recreational, transportation, or storm water drainage services, was the city justified in imposing on the Dolans conditions of approval of their store expansion requiring them to dedicate to the city ten percent of their land for a greenway, an expanded future storm water drainage channel, and a pedestrian and bicycle pathway?

2. Where the Dolans asserted to the city that its dedications were a taking because those dedications failed to substantially advance a legitimate state interest, was the city required to find the terms of the dedications were reasonably proportional in both character and degree to the direct, quantifiable burdens on municipal services created by the Dolans' proposed store expansion?

3. Where the city's permit dedications were challenged as a taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution, did the Oregon Supreme Court err in failing to apply heightened scrutiny to the Dolans' claims that the city's factual findings were not legally sufficient, under this Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), to justify its imposed dedications?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding. In the proceedings before the Oregon Supreme Court below, John Dolan, husband of Petitioner Florence Dolan, was also a Petitioner, together with Florence Dolan. Mr. Dolan is now deceased, and is survived by his widow, Florence Dolan.

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No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari To The Oregon Supreme Court

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Oregon Supreme Court (Pet. App. A, pp. A-1 through A-30) is reported at 317 Or. 110, 854 P.2d 437 (1993). The opinion of the Oregon Court of Appeals (Pet. App. C, pp. C-1 through C-10) is reported at 113 Or. App. 162, 832 P.2d 853 (1992). The opinions of the Oregon Land Use Board of Appeals (Pet. App. D, pp. D-1 through D-18, and Pet. App. E, pp. E-1 through E-24) are reported at 22 Or. LUBA 617 (1992) and 20 Or. LUBA 411 (1991) respectively. Resolution 91-66, the Final Order of the City of Tigard, dated September 17, 1991, incorporating by reference Final Order 91-09 PC of the City of

Tigard Planning Commission, dated July 15, 1991 (Pet. App. G, pp. G-1 through G-48) is not reported.

JURISDICTION

The judgment of the Oregon Supreme Court was entered on July 1, 1993, and appellate judgment was entered on July 28, 1993. The petition for a writ of certiorari was filed on September 29, 1993, and was granted on November 29, 1993. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

The statutes at issue are Oregon Revised Statutes (ORS) 197.010 (1991) and 197.175 (1991) (Pet. App. H, pp. H-1 through H-3). The administrative rules at issue are Oregon Administrative Rule (OAR) 660-15-000(5), Open Spaces, Scenic and Historic Areas, and Natural Resources (1975) and OAR 660-15-000(12), Transportation. OAR 660-15-000(5) and OAR 660-15-000(12) are set out, in full, in Appendices A and B to this brief.

The ordinances at issue are the City of Tigard Comprehensive Plan, Volume 2, revised December, 1987 (plan), and Title 18 of the City of Tigard Community Development Code, revised February, 1989 (CDC). The relevant portions of the Comprehensive Plan are set out at Pet. App. J, pp. J-1 through J-2. The relevant portions of the CDC are set out at Pet. App. K, p. K-1 and at Appendix C to this brief.

STATEMENT OF THE CASE

Mrs. Dolan, an elderly widow, owns a 1.67 acre commercial lot on Main Street in the City of Tigard (city), on which there is an existing 9700 square foot building that she uses for the operation of a small retail electric and plumbing supply store. The lot is in the Commercial Business District (CBD) zone. Pet. App. G. p. G-3. With the exception of the land under the existing building, the 71,500 square foot lot is devoted to customer parking, part of it being paved, and most of the remainder being surfaced with gravel. Fanno Creek, a small stream, runs adjacent to the west side of the lot. Part of the property is within the creek's 100 year flood plain. Mrs. Dolan, and her late husband John, desiring to expand and modernize their business to meet commercial competition, applied to the city for approval to raze the existing old 9700 square foot building and to build a new, larger, 17,600 square foot, building, better suited to the needs of their business. Pet. App. D, p. D-3. The use for which they applied is a permitted use in the CBD zone. App. C-2. They also proposed to establish a paved parking area of 39 spaces.

Pet. App. G, p. G-30, encompassing 20,200 square feet, and covering 40 percent of the lot. J.A. at 3.

The city approved their application, subject to certain conditions. Among those conditions was the requirement that the Dolans dedicate to the city 7000 square feet of their 1.67 acre lot, which included all of the land within the creek's 100 year flood plain for a greenway, plus an additional 15 foot wide strip adjacent to the flood plain for a pedestrian and bicycle pathway. The city's conditions were imposed pursuant to the city's Comprehensive Plan and Community Development Code. That plan and code had been prepared and adopted pursuant to laws promulgated by the State of Oregon.

In 1973, the State of Oregon adopted a statute requiring cities and counties to adopt comprehensive land use plans in compliance with statewide land use goals developed by the state's Land Conservation and Development Commission (LCDC), an administrative agency created to direct and administer the state's land use regulatory system. Cities and counties were also required to adopt land use regulations to implement their comprehensive plans. Pet. App. H, p. H-2.

The LCDC, in 1975, developed statewide land use Goal 5 to conserve open space and protect natural and scenic resources. That goal required cities and counties, including the City of Tigard, to provide programs to protect, *inter alia*, "[l]and needed or desirable for open space." App. A-1. The goal defined open space to include "any land area that would, if preserved and continued in its present use," "protect streams," "enhance the value to the public of neighboring parks . . . or other open space,"

and "enhance recreation opportunities." App. A-2, 3. The goal's implementing measures encouraged cities and counties, in providing such programs, to use "fee acquisition, . . . preferential assessment, development rights acquisition and similar techniques . . . ." App. A-5.

In 1975, the LCDC also adopted statewide land use Goal 12 to provide and encourage a safe, convenient and economic transportation system. Cities and counties were required to prepare transportation plans that "consider all modes of transportation including . . . bicycle and pedestrian," and to "avoid principal reliance on any one mode of transportation." App. B-1. The goal also provided that "[t]ransportation systems, to the fullest extent possible, should be planned to utilize existing facilities and rights of way . . . ." App. B-2.

The city, pursuant to state law and the state land use goals, thereafter adopted a comprehensive land use plan, last revised in November, 1983. That plan included a finding that the city would develop policies to retain "a vegetative buffer along streams and drainageways, to reduce runoff and flood damage and provide erosion and siltation control." Pet. App. J, p. J-1. The policy adopted by the city to implement that finding required, along Fanno Creek, "[t]he dedication of all undeveloped land within the 100-year floodplain plus sufficient open land for greenway purposes specifically identified for recreation within the plan." Pet. App. J, pp. J-1, 2. The city described the land to be dedicated as "the backbone of the open space system." Pet. App. J, p. J-2. The plan made no provision for fee acquisition, preferential assessments, or acquisition of development rights as means for the city to acquire that land. Instead, the plan mandated that

those owning property along the creek were to be singled out when they sought approval of land use permits and required to dedicate that land.

Finally, the plan's transportation section established that "[t]he City shall review each development request adjacent to areas proposed for pedestrian/bike pathways to . . . require the necessary easement or dedications for the pedestrian/bicycle pathways." Pet. App. J, p. J-2. The plan made no provision for the pedestrian and bicycle pathways along Fanno Creek to be established in existing rights of way, but again singled out those property owners along the creek to dedicate the necessary right of way when they sought approval of land use permits.

To implement these plan provisions, the city revised its zoning ordinance, Title 18 of its Community Development Code (C.D.C.), in February of 1989. That code, at Section 18.120.180.A.8, provided, for approval of site development plans for development in and adjacent to 100-year floodplains, that the city shall "require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." Pet. App. K, p. K-1. The city's code did not require either findings or evidence establishing any relationship between this dedication and development impacts.

When the Dolans applied for site development review, the city, pursuant to C.D.C. § 18.120.180.A.8, required the Dolans to dedicate to the city: (1) all of the portions of their lot lying within the 100-year flood plain,

for use by the city as a greenway; and (2) an additional 15 foot strip of property adjacent to and above the 100-year flood plain, for use for future reconstruction of a storm drainage channel and as a public pedestrian and bicycle pathway, and additionally to construct that pathway. Pet. App. G-28, 43. The total land required to be dedicated was approximately 7000 square feet, or about 10% of the total 1.67 acre parcel, of which 3600 square feet fell above the flood plain boundary. The Dolans argued these dedications were unconstitutional[1] and sought from the city a variance from them. In denying the variance, the city again rejected their constitutional arguments.

There was, however, neither any direct evidentiary linkage between the development of the Dolans' new store and the imposed dedications, nor any detailed studies demonstrating such adverse impacts on the city. The city's findings justified the greenway exaction by determining additional stormwater runoff, resulting not only from the Dolans' development, but also from "elsewhere within the Fanno Creek drainage basin, is expected to increase flow within the creek" and concluded the public needs the "ability to make channel modifications

---

[1] The city's imposition of dedications during site development review was originally challenged in the Oregon Land Use Board of Appeals (LUBA), as violating the Federal Constitution. LUBA denied the appeal, holding the constitutional claim was not ripe because of failure to pursue a variance. Pet. App. E-1 – E-24. Petitioner, together with her late husband, John T. Dolan, then reapplied to the city, seeking a variance. When the City Council, on September 19, 1991, denied their variance application, the Dolans again appealed to LUBA, reasserting their Federal Constitutional claim. J.A. at 4.

in this area to offset the increase in stream flow." Pet. App. G, p. G-40. Even though the city concluded the new store was "similar to a 'general retail sales, bulky merchandise' use," Pet. App. G, p. G-32, the city's findings purported to justify the pedestrian and bicycle pathway dedications by determining they were "reasonably related to the applicant's request to intensify the development of this site," because it was "reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs."[2] Pet. App. G, p. G-24.

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[2] The city also imposed on the Dolans three other conditions: First, a $14,256.02 traffic impact fee "to ensure that [this] new development contributes to extra-capacity transportation improvements needed to accommodate additional traffic generated by such development." Pet. App. G, pp. G-14, 15. Even though the city later eliminated this fee as a specific condition of approval, the city made clear the Dolans would have to pay the fee during the course of their project:

> "The Planning Commission's decision eliminates condition of approval #9 of the Director's designee's decision. That condition stated that a Traffic Impact Fee was required to be paid upon issuance of a building permit for the proposed building on the site. While the Commission does not find that this statement regarding the Traffic Impact Fee needs to be a condition of approval of the application, this action does not relieve the applicant of the responsibility of compliance with Washington County Ordinance 379 . . . [requiring payment of] the county-wide Traffic Impact Fee . . . ." *Id.* at G-47, 48.

Second, the city required the Dolans to calculate the actual increase in impervious surface on their lot that would contribute to increased storm water runoff, and to pay a "fee in-lieu of water quality" to mitigate the effects of that runoff. *Id.* at G-45, 46.

On review, the Oregon Supreme Court affirmed the decisions of LUBA and the Oregon Court of Appeals, which had rejected the Dolans' constitutional takings claim.[3] The Oregon Supreme Court stated that the city's site development review dedications were not a taking because the transportation impacts of, and the storm water runoffs from, the Dolans' new larger store, were reasonably related, respectively, to the requirements to dedicate land for a pedestrian and bicycle pathway, and a greenway. The court rejected the Dolans' contention the "cause and effect" relationship or "essential nexus" of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) required it to subject the city's decision to heightened scrutiny – and to find the city's decision unconstitutional unless the city's findings established a "substantial relationship" between the impacts of the development and the dedication requirements. Pet. App. A, p. A-13.

Justice Peterson dissented from the court's decision. In his view, the city failed to establish the necessary relationship between the impacts of the Dolans' use and the dedications imposed on them. He asserted he "would require [city] findings that *demonstrate* that the increased

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Third, the city required the Dolans to relocate the "footprint" of their building to the east "in order to accommodate the future City-initiated relocation of the floodplain bank [approximately five feet to the east]." *Id.* at G-13.

[3] The Dolans unsuccessfully argued at every level of appeal below that the reviewing court should apply heightened scrutiny and hold the city's findings are not legally sufficient to establish the requisite "essential nexus" between the impacts of the proposed development and the dedications imposed. Petitioner's Reply to Br. in Opp. at 4.

intensity of the use requires the exaction." Pet. App. A, p. A-25 (Peterson, J., dissenting) (emphasis in original).

SUMMARY OF ARGUMENT

This case squarely presents the question of when this Court's opinion in *Nollan* permits a local government to demand real property be dedicated to the public by the owner of a small business as a condition of the government allowing her to secure a building permit to expand her business to meet the competitive demands of commerce.

Petitioner, Mrs. Florence Dolan – owner of the A-Boy Plumbing supply store, located on property adjacent to Fanno Creek on Main Street in Tigard, Oregon – contends the city may not impose that dedication on her, without violating the Fifth and Fourteenth Amendments to the U.S. Constitution, unless there is evidence in the record that her expanded business's adverse impacts on municipal recreation, storm water disposal, and transportation services are directly, substantially, and proportionately linked in both character and degree to the dedications.

Disregarding Mrs. Dolan's argument that such findings were mandated by this Court's decision in *Nollan*, 483 U.S. at 834 n.3, 841 (1987), the city required her to dedicate to the city 7000 square feet of her commercial property as a condition of approval of her proposal to raze her existing store and replace it with a new, larger and more modern retail sales facility. The city contended, regardless of the reasons for Mrs. Dolan's proposal, it is always free to require the dedication of real property

along Fanno Creek as long as it will contribute to the implementation of the public policies reflected in the city's comprehensive land use plan. The city's contention places directly upon the shoulders of Mrs. Dolan, as a riparian land owner, the full cost of public benefits derived from enhancing public recreation, storm water disposal, and transportation services on her property. That result cannot be squared with the guarantees of the Fifth and Fourteenth Amendments as interpreted by this Court's decisions on the imposition of special assessments on property owners.

Mrs. Dolan is being subjected to the most severe form of deprivation of her property rights – formal expropriation of almost ten percent of her fee interest in her land. Her request to raze and rebuild her plumbing and electric supply store provides no justification for the city to require her to dedicate a portion of her property to the city for a greenway, expanded storm drain channel, and pedestrian and bicyclist pathway, and to construct that pathway. Her proposal was never quantified by the city as having any definite and specific increased adverse impacts on municipal services. The city assumed, theorized, and hypothesized her proposed use might have adverse impacts.

This Court has repeatedly noted that the underlying purpose of the Takings Clause is to ensure that some persons alone are not required to bear fully the cost of public benefits "which, in all fairness and justice should be borne by the public as a whole." *See, e.g., Nollan*, 483 U.S. at 835-836 n.4 (citation omitted). Under the facts of the instant case, where Mrs. Dolan's action has not been

shown, by evidence in the record, directly and specifically to have created the need for a public greenway, expanded storm drain channel, and pedestrian and bicyclist pathway, and Mrs. Dolan's property receives no special benefits from those public facilities, she is being unfairly and unjustly required to bear the full costs of providing those facilities for general public use.

The city's decision, relying on hypothesis and assumptions, violated this Court's holding in *Nollan* that there must be an "essential nexus" between project impacts and dedication conditions. Those conditions must be reasonably fashioned in both character and degree to address the adverse impacts that the reconstruction of Mrs. Dolan's store would impose on the public health, safety and welfare. Neither the strength of the public need for the greenway, expanded storm drainage channel, and pedestrian and bicyclist pathway, nor a showing of a reasonable, or rational relationship, between the dedication conditions and the legitimate interests sought to be achieved by the city, is sufficient to defeat Mrs. Dolan's takings claim. Because the character and degree of the burdens imposed by the permit conditions on Mrs. Dolan are wholly out of proportion to the adverse impacts of her new store on the public, the conditions are unconstitutional.

The Oregon Supreme Court, in upholding the constitutionality of the city's decision, and rejecting Mrs. Dolan's claim that the city's land use decision failed to substantially advance a legitimate state interest, did not apply the correct degree of judicial scrutiny to the city's purported "essential nexus." The Oregon Supreme Court, affirming the judgment of the Oregon Court of Appeals

and the Oregon Land Use Board of Appeals, held the city's dedications were not an unconstitutional taking because the federal constitutional takings/exactions standard of review does not require heightened scrutiny of the relationship between the adverse impacts of a proposed use and government-imposed dedications. The court concluded the dedications imposed by the city were reasonably related to the adverse impacts of the Dolans' new store.

The failure of the Oregon Supreme Court to make an appropriate legal analysis of the burdens being imposed on Mrs. Dolan by the city denied her any meaningful consideration of whether the dedication conditions constituted a taking in violation of the Fifth and Fourteenth Amendments. Petitioner respectfully urges this Court to reverse[4] the decision of the Oregon Supreme Court, and hold that the City of Tigard violated the Fifth and Fourteenth Amendments to the U.S. Constitution when it required dedication of 7000 square feet of Mrs. Dolan's private property as a condition of site development approval for her new plumbing and electrical supply store in downtown Tigard.

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[4] In Oregon, a decision by the Oregon Land Use Board of Appeals, or a court reviewing L.U.B.A.'s opinion, of a local land use decision, may reverse that local decision as being unconstitutional. *See* Br. in Opp. App. C-3. Where a land use decision is found unconstitutional, "[a]n owner who maintains that the government's acts entitle him to compensation may seek compensation in circuit court [Oregon's court of general jurisdiction]." *Dunn v. City of Redmond*, 303 Or. 201, 209, 735 P.2d 609 (1987). Thus, reversal of the subject decision by this Court would enable Mrs. Dolan to seek compensation for inverse condemnation in Oregon's circuit courts.

ARGUMENT

I

MRS. DOLAN HAS NEITHER RECEIVED ANY SPECIAL BENEFITS NOR CREATED ANY SPECIAL, QUANTIFIABLE PUBLIC BURDENS TO JUSTIFY THE IMPOSITION ON HER OF THE FULL COST OF PROVIDING A PUBLIC GREENWAY AND PEDESTRIAN AND BICYCLE PATHWAY THROUGH HER PROPERTY ALONG FANNO CREEK

It is unfair and unjust for Mrs. Dolan to be singled out to bear the burden of completing the city's long-standing plans for greenways, storm drains, and pathways through her property. Mrs. Dolan is not responsible to provide parkland, storm drainage, and pedestrian and bicycle pathways for the people of the city. The city, implementing its policy with cavalier disregard for state-encouraged compensatory means in Goals 5 and 12, is confiscating the property it desires from individual riparian property owners along Fanno Creek through dedication mandates in land use development permits.

There is nothing exceptional about the Dolans' land use application. It represents the common stuff of day-to-day land use actions. It required no plan changes or zoning modifications. The subject parcel was not to be divided. The use, which is an approved use under the existing zoning, remains unchanged. The application requested only a building permit to replace an existing commercial building with a larger commercial building, fully within the boundaries of the existing parcel. The facts of Mrs. Dolan's case provide no justification for the

city to single her out to bear a particularly onerous burden, which in fairness should be borne by the public at large.

This Court has long recognized that the Fifth Amendment's Takings Clause is intended "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This Court also has recognized that, when government assesses landowners to provide public improvements, those assessments may be justified as being fair and just only if based on the special governmental benefits received by landowners, *Norwood v. Baker*, 172 U.S. 269, 279 (1898), and then only if a fair standard of apportionment of the costs is used. *Hancock v. City of Muskogee*, 250 U.S. 454, 458-459 (1919). Finally, this Court also has long recognized that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922).

If the city were to formally establish a new public park, or a new storm drain, or a new transportation corridor, on Mrs. Dolan's 1.67 acre private lot, there can be no question that it would have to condemn the riparian area of her property, and the 15 foot strip adjacent thereto, and pay her for the market value of that property so condemned. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984). Nothing in the facts of this case justifies the establishment of a park, storm drain, and transportation network by using permit conditions to avoid the city's

constitutionally-mandated obligation to condemn and pay for what it wants.

Even though the city's code specifically and directly requires dedication of the property, there is nothing in the city's Comprehensive Plan and Community Development Code that prevents the city from justly compensating affected landowners when the city applies that code provision, and, under the facts of the case, the Constitution mandates payment of just compensation. The underlying policy of the State of Oregon, manifested in Statewide land use Goal 5, empowered the city to use fee acquisition, developmental rights acquisition, and preferential assessment to compensate Mrs. Dolan for the greenway dedication. *See* App. A-5.[5]

In the instant case, the city is acting to fulfill a long-standing plan to establish a park network, storm drainage improvement system, and recreational pedestrian and bicyclist trail system. *See* Pet. App. J, pp. J-1, 2. Mrs. Dolan certainly could be assessed for her fair share of the costs of providing these public amenities. However, the

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[5] That State policy has been recognized by Chief Justice Rehnquist within the context of government protection of historic landmarks. In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), he noted that "many States and cities in the Nation have chosen to preserve . . . [the natural and aesthetic values of property] by purchasing or condemning restrictive easements . . . and are apparently quite satisfied with the results. *See, e.g.*, Ore. Rev. Stat. §§ 271.710, 271.720 (1977) [replaced by ORS §§ 271.715 – 271.795 (1991) (local government may purchase conservation easement from willing landowner to protect natural, scenic or open space values of real property)]. . . . " 438 U.S at 152 n.14 (Rehnquist, J., dissenting).

city has identified no special benefits conferred on Mrs. Dolan, and has not identified any specific quantifiable burdens created by Mrs. Dolan's new store that would justify imposing a burden on Mrs. Dolan that is not imposed on the public at large.[6]

The effective replacement of one retail sales building with another on Mrs. Dolan's property occurs entirely within the boundaries of her private property, J.A. at 3, and will not impair or destroy in any way any manner of use by the general public of Fanno Creek or the city's Main Street on which the property fronts.

Similarly, Mrs. Dolan benefits in no discernible way from the greenway and pedestrian and bicycle pathways. Even the city agreed that customers come to Mrs. Dolan's store to purchase bulky items rather than to browse for small, personally-transportable plumbing and electric supplies. Pet. App. G. p. G-31, 32. The effects of the dedications on Mrs. Dolan are all negative. She must relocate her new building on the site, incurring additional costs and loss of parking spaces during construction and prior to the demolition of the old building on the site, and

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[6] The city's findings are grossly inadequate when compared to those found by the Court of Appeals for the Ninth Circuit to satisfy the "essential nexus" of *Nollan*. In *Commercial Builders v. Sacramento*, 941 F.2d 872, 873 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992). The city's impact fee exaction ordinance, found to be constitutional, was supported by a detailed study by an outside consultant that identified the specific impacts generated by new developments in terms of numbers of new low-income workers and the government financial burden, in thousands of dollars, per worker. The exaction was set based on that exhaustive study.

then must sustain the costs of building the pathway. The public receives all the benefits of these dedications. Mrs. Dolan bears all the burdens.

In fact, the city separately imposed assessments on Mrs. Dolan that required her to pay her fair share of the costs of both transportation improvements and provisions for storm water runoff from the enlarged building. Pet. App. G, pp. G-13, 14. The property dedication was a bonus which the city extracted in addition to the assessments it imposed. Moreover, the city also imposed an additional requirement that Mrs. Dolan construct the pedestrian and bicyclist pathway on the property she was required to dedicate to the city. Pet. App. G, p. G-28.

The reconstruction of the store and the requirement for the dedications are independent acts. If the Dolans were to have never sought a building permit, the city would still have its requirement to complete its greenway and pathway system across Mrs. Dolan's land, and would have to have exercised its power of eminent domain to acquire the land. Since the Dolans did seek a building permit, however, Mrs. Dolan now must pay with her property, not because of any harmful thing she is doing or any beneficial thing she will receive, but because she has the misfortune to own land which the city determined "will be the backbone of [the city's] open space system." Pet. App. J, p. J-2. She is caught in the middle of the city's program to provide "a continuous pathway system intended to serve the public good." Pet. App. G, p. G-26.

The imposition of the dedications, which have no demonstrated relationship to any benefit received or burden created by Mrs. Dolan, violates basic principles of fairness. Her fair share of the cost of providing the general public with a greenway, expanded storm drain channel, and pedestrian and bicycle pathway, is no more than that of any other member of the public at large. In *Nollan*, this Court held, on facts analogous to the facts of the instant case, that a local government "is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' " but, if it wants to provide for public access over private property, "it must pay for it." 483 U.S. at 841-842. This Court should hold the city's dedication requirements in the instant case are patently unfair and unjust special assessments, and unconstitutional under the Fifth and Fourteenth Amendments.

II

THE CITY OF TIGARD FAILED TO ESTABLISH THE REQUIRED "ESSENTIAL NEXUS" OF A REASONABLY DIRECT AND PROPORTIONAL RELATIONSHIP BOTH IN CHARACTER AND DEGREE BETWEEN THE EFFECTS OF MRS. DOLAN'S PROPOSED STORE IMPROVEMENTS AND THE EXACTION OF 7000 SQUARE FEET OF HER PRIVATE PROPERTY

Mrs. Dolan asserted to the city that its dedication conditions were a taking because those dedications failed to substantially advance a legitimate state interest. Therefore, the city was required to find that the terms of the

dedications were reasonably proportional, in both character and degree, to the direct, quantifiable burdens on municipal services caused by the Dolans proposed store expansion.[7] The city made no such findings.

Dedications imposed as conditions to receiving a development permit can result in a regulatory taking in violation of the Fifth Amendment. *Nollan, supra.* The takings test applied in *Nollan* was whether the permit condition " 'substantially advance[s] legitimate state interests.' " *Id.*, 483 U.S. at 834 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (land use regulation does not effect a taking if it substantially advances a legitimate state interest and does not deny an owner economically viable use of her land)) (brackets in original). For a development permit to meet this test, there must be an "essential nexus" between the permit condition and the adverse impacts of the proposed development. *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting) (must have a "cause and effect relationship between the property use . . . and the social evil").

This Court's *Nollan* majority's holding on the nexus requirement established there must be a "close fit" for the cause and effect relationship between development impacts and conditions of approval. This "close fit" was

[7] In dissent, Oregon Supreme Court Justice Peterson concluded the city had the burden of showing the Dolans' development created a need for the city's exactions. He asserted the majority of the Oregon Supreme Court agreed the city had this burden. Pet. App. A, p. A-18 (Peterson, J., dissenting).

clearly delineated by Justice Scalia, responding to the dissent of Justice Brennan:[8]

> Even if the [California Coastal] Commission had made the finding that JUSTICE BRENNAN proposes, however, it is not certain that it would suffice. *We do not share JUSTICE BRENNAN's confidence that the Commission "should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access," post* at 862, that will avoid the effect of today's decision. We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction. . . .

Nollan, 483 U.S. at 840-841 (emphasis and brackets in original). Justice Scalia thus made it apparent that there must be a close, specific and direct link between means

[8] In dissent, Justice Brennan had argued: "The Court's insistence on a *precise fit between the forms of burden and condition on each individual parcel* along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate." 483 U.S. at 847 (Brennan, J., dissenting) (emphasis added). He later characterized the *Nollan* Court's opinion as an "unusual demand for a precise match between the condition imposed *and the specific type of burden on access created by the appellants.*" *Id.* at 849 (emphasis added).

and ends in order for dedications imposed on development to be constitutional.

Furthermore, this Court's decisions have long recognized that the Fifth Amendment requires the permit condition to be reasonably fashioned both in character and degree to be proportional to those burdens that the proposed use of the private property would impose on the public health, safety or welfare. *See*: *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (Takings Clause prevents public from imposing on single individual more than his just share of burdens); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986) (there is nothing to show that the withdrawal liability imposed on an employer will always be out of proportion to its experience with the pension plan). In the absence of a proportionate cause-and-effect relationship, or "essential nexus," the permit condition is not a legitimate regulatory action but a means of "extortion" which works a taking in violation of the Fifth Amendment. *Nollan*, 483 U.S. at 837.

Nollan articulates the basic premise that the right of use is an essential attribute of the ownership of property. Therefore, the approval by a local government of a land use permit does not bestow a government benefit on the permit applicant that would justify government demanding a *quid pro quo* for permit approval. Consistent with this principle, this Court ruled in *Nollan* that property dedications, which in other circumstances would constitute a taking, would be justified in the context of land use approvals only if the property dedication substantially advances the same legitimate state interest that could, in the alternative, justify denial of the permit altogether. The

Oregon court, and many other courts which have purported to apply the *Nollan* analysis[9], have failed to recognize this essential principle on which the decision rests.

Demonstration of a substantial nexus between the dedication and the adverse effects of the proposed action is necessary to ensure that the actual conveyance of private property to the government is, under the circumstances of the specific case, a substitute for a regulatory restriction on the owner's right of use and not a disguised acquisition of property by government.

In this case, the city did not demonstrate the existence of the essential nexus required by *Nollan*. No attempt was made to establish that the unquantified effects asserted by the city to result from the enlarged building would justify denial of the permit in absence of the required dedication. It is clear that the effects of Mrs. Dolan's proposal on storm water runoff, transportation, and greenway facilities would not be different from any

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[9] *See, e.g.*: *Bernardsville Quarry v. Bernardsville Borough*, 608 A.2d 1377, 1383-1384 (N.J. 1992) (adverse impacts of development need only be reasonably determined on adequate evidence to be inimical to a legitimate government interest); *Pengilly v. Multnomah County*, 810 F. Supp. 1111, 1113 (D.Or. 1992) (*Nollan* does not require that individual proposed developments must be shown to have deleterious impact before dedication conditions can be imposed on them); *Commercial Builders* 941 F.2d at 874-875 (*Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question); *Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696, 699 (9th Cir. 1991) (there must be substantial relationship between exactions and the stated government interest, not the development's impacts).

other similar development in the city. Indeed, Mrs. Dolan is required to pay the same assessments as other similar owners would to offset resulting burdens on transportation and storm water facilities. Pet. App. G, pp. G-13, 14. With payment of the special assessments, the record demonstrates no basis for denial of the applications. Therefore, there is no way to establish a nexus between the required property dedications and a legitimate state interest that could justify denial of the permit.

The record shows the circumstances in this case to be exactly what this Court sought to prevent in adopting the nexus requirement in *Nollan*. The only exceptional thing about Mrs. Dolan's proposal was its location on land the city wished to acquire for other established city programs. The dedication was imposed to avoid the cost of land acquisition for those other programs.

Since the required nexus must relate the property dedications to reasons justifying denial of the application, it is difficult on these facts to analyze the nexus standard in any more detail. No valid reasons justifying denial of the permit were set forth. The burdens on transportation and storm water facilities were offset by assessments. However, even if it is assumed that some residual burdens remain, the failure of the city to identify and quantify those burdens leaves no support for its claim that the required nexus exists.

By adopting a "reasonably related" relationship, the city ignored this Court's *Nollan* precedent that the "essential nexus" requires a "substantially related" connection – a direct and proportionate link – between the proposed

development and the adverse public impacts occasioned by that development. *See* Pet. App. A, pp. A-9 – 13.

The nexus used by the city is one which utterly fails to establish a substantial relationship between a proposed project and the adverse public impacts which a permit condition is designed to alleviate. Indeed, the nexus analysis conducted by the City of Tigard did not even attempt to establish that the Dolans' dedication of land and construction of the pathway was directly and proximately necessitated by the stormwater runoff and additional pedestrian and bicyclist traffic which their enlarged commercial facility would cause. All the city could find was the dedications were "reasonably related" to the storm-water runoff and pedestrian and bicyclist traffic that *would be expected* to be caused by the new facility.

In his dissent below, Justice Peterson of the Oregon Supreme Court made clear the city had made a decision that was not based on an "essential nexus."

> From reading [the city's] order in this case, I am convinced Tigard decided that it needed a pedestrian/bicycle pathway and a flood control easement along Fanno Creek. One way of getting these, free of cost, is by requiring all owners who propose to change the use of their property to convey the easements to the city. That is what happened in this case.
>
> The findings here do not establish any cognizable remediable purpose attributable to the [Dolans' proposed] change in use. The conditions relating to the pedestrian/bicycle pathway

and flood control and greenway easements are impermissible on the record made in this case.

Pet. App. A, pp. A-29, 30 (Peterson, J., dissenting).

The record also fails to disclose any cause and effect relationship. Even though the city's asserted relationship between the greenway exaction and the impact of the demolition and reconstruction of the petitioners' building is recited as being "reasonably related," the real underlying city purpose in requiring the petitioners to dedicate greenway land is: (1) To further the objectives of the city's *Master Drainage Plan;* and, (2) to provide for the physical relocation and expansion of the Fanno Creek channel to accommodate stormwater runoff from additional new development projected in the drainage basin. Pet. App. G, pp. G-38, 39.

There is no evidence in the record that the greenway property exacted from petitioners is even related to any hypothetical increase in stormwater runoff caused by demolishing a 9700 square foot structure, and replacing it with a 17,600 square foot structure. The city's requiring the dedication of petitioners' land, and the construction of a pedestrian/bicycle pathway, also bears no relationship to the impacts of their proposed development. There is no relationship between the impacts on public pedestrian and bicycle movement created by the demolition and reconstruction of the retail sales building, and the requirement that the Dolans dedicate their private property to the city for a pedestrian/bicycle pathway.

The city's justification for this dedication was merely a subterfuge. The findings of the city's planning commission, adopted by the city council in its decision, found the

dedications reasonably related to the development of the site, found it reasonable to assume and reasonable to expect the development would have anticipated transportation impacts, and concluded the dedications could offset some of those impacts. Pet. App. G, p. G-24. The city acted as it did because its code required it to, and not because it made, or could make, findings based on evidence of adverse impacts. The city's code required dedication of land for a greenway and pedestrian pathway without regard to any impacts, adverse or otherwise, of the development.

The "reasonable" "expectations" and "anticipations" in the city's findings were nothing more "than an exercise in cleverness and imagination." *Nollan,* 483 U.S. at 841. There was no essential nexus between the city's conditions and the impacts of the petitioners' proposed use. Disregarding *Nollan,* the city required dedication of land by Mrs. Dolan to help complete an already existing, and partially completed, greenway and pathway system by what Justice Scalia termed "an out-and-out plan of extortion." *Id.* at 837 (citations omitted).

The city's true purpose in requiring dedication of the petitioner's land for, and construction of, a pedestrian/bicycle pathway was to achieve general public benefit,[10] not to offset the current and future adverse effects of the demolition and reconstruction of the retail sales building.

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[10] The record makes clear that the pathway dedication and construction was intended to meet "the City's adopted policy of providing a continuous pathway system intended to serve the general public good." Pet. App. G, p. G-26.

The city's comprehensive plan required outright dedication regardless of impacts, or the lack thereof. Pet. App. G, p. G-25.

In sum, the decision of the city, requiring that Mrs. Dolan dedicate her land for a greenway and a pedestrian/bicycle pathway, and then construct that pathway, is nothing more than a manifestation of the clear intent to secure public improvements by forced dedications, and was made in spite of the city's failure to demonstrate any specific, proportionate relationship between the impacts of either stormwater runoff or pedestrian and bicycle use and demolishing and then replacing the petitioners' retail sales building.

In the instant case, Justice Peterson, dissenting from the Oregon Supreme Court's opinion, described the inadequacy of the city's findings, giving as an example the justification of the dedication for the greenway and storm drainage: "All these findings establish is that there will be some increase in the amount of storm water runoff from the site. A thimbleful? The constitution requires more than that." Pet. App. A, p. A-26 (Peterson, J., dissenting). If the city had, by a study, determined how much storm water entered Fanno Creek, and specifically how much more runoff would be caused by the Dolans' new store, it might have been able to constitutionally justify the dedication for the storm drain and greenway. It made no such study. If it had, by a study, determined the number of additional pedestrians, bicyclists, and automobiles the new store would generate, and how those numbers compared to the existing traffic loads on city streets, sidewalks, and bikepaths, it might have been able

to justify the pedestrian and bikepath dedication. It made no such study.[11]

In the absence of such detailed studies supporting specific city findings of direct impacts, the city has engaged in a creative and cost-free method of providing public recreation, storm drainage, and transportation improvements – demand the land for those improvements from development applicants.

In his dissent to the decision of the Oregon Supreme Court in *Dolan*, Justice Peterson argued for a close fit between development's adverse impacts and such exaction schemes: "I read the federal precedents to require a high threshold that the government must meet in showing the exaction is needed because of intensified land use by the landowner." Pet. App. A. p. A-29 (Peterson, J., dissenting). This Court made clear in *Nollan* that such a close fit was required. The city ignored that requirement and made an unconstitutional decision when it demanded 7000 square feet of Mrs. Dolan's private commercial property from her.

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[11] The city's conclusory findings "justify" the dedication of the land within the 100-year floodplain of Fanno Creek for a greenway on the basis of storm water runoff and increased flows in the creek, even though a principal purpose of the greenway was recreation. *See* Pet. App. J, pp. J-1,2. However, the city totally failed to justify how a new plumbing store was related to the dedication of greenway land for public recreation.

III

THE OREGON SUPREME COURT DID NOT APPLY THE HEIGHTENED SCRUTINY MANDATED BY THIS COURT IN *NOLLAN* TO THE CLAIM OF MRS. DOLAN THAT THE REQUIRED DEDICATION OF 7000 SQUARE FEET OF HER PROPERTY VIOLATED THE TAKINGS CLAUSE

The Oregon Supreme Court, in upholding the constitutionality of the city's decision, and in rejecting Mrs. Dolan's claim the city's land use decision failed to substantially advance a legitimate state interest, did not apply the correct degree of judicial scrutiny to the city's purported "essential nexus." The level of scrutiny is the key factor in determining whether the Fifth Amendment's Takings Clause provides protection to property owners from government exaction schemes, such as that of the City of Tigard. The Oregon Supreme Court's use of a "reasonably related" level of review – virtually no scrutiny whatsoever – easily led to a decision upholding the dedication exaction even though the alleged nexus was only hypothetical and speculative. Any close reading of the record establishes that a cause and effect nexus never existed. *See* Argument II, *supra*.

In *Nollan*, this Court recognized that the imposition of dedications on development permits was one context in which closer judicial scrutiny of means-ends relationships was in order.[12] This closer look is particularly

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[12] In *Nollan*, Justice Scalia noted "there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as regulation of property is at issue the standards for takings challenges, due process challenges, and

important where government acts to take property ownership away from private citizens. Heightened scrutiny "is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding." *United States v. Good*, 62 U.S.L.W. 4013, 4017 (U.S. Dec. 13, 1993) (footnote and citation omitted). *See also Harmelin v. Michigan*, 501 U.S. ___, 111 S. Ct. 2680, 2693 n.9 (1991) ("As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.") (citations omitted).

Mrs. Dolan urged the Oregon Supreme Court to apply heightened scrutiny to the city's decision imposing dedications on her: "The *Nollan* majority's holding on the nexus requirement establishes a heightened level of scrutiny for the cause and effect relationship between development impacts and conditions of approval." Petition for Review at 8, *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993) (reproduced in Pet. App. A). The Oregon Supreme Court declined to do so: "[W]e are unable to agree with petitioners [Mr. and Mrs. Dolan] that the

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equal protection challenges are identical . . . ." 483 U.S. at 835 n.3.

Professor Epstein amplifies this call for heightened judicial scrutiny when he writes: "Under the traditional rational basis test, that concern [with the state's ability to exact concessions from landowners] is so weak that state power (including the power to bargain) would remain unbridled. It is therefore no accident that Justice Scalia's implicit invocation of the doctrine followed a more general assertion that the deferential rational basis review does not carry over from equal protection to takings cases." Richard A. Epstein, *The Supreme Court – Forward*, 102 Harv. L. Rev. 4, 63 (1988).

Nollan court abandoned the reasonably related test." Pet. App. A, p. A-13 (footnote omitted).

Rejection of heightened scrutiny was fatal to Mrs. Dolan's taking claim. The scrutiny employed by the Oregon Supreme Court treats the city's action like a legislative enactment and would legitimize any and every land use decision of the city unless totally arbitrary or based on an invidious rationale. This "standard" is based on the presumption that the city acts properly. It provides no protection against even thinly disguised expropriation of property.

The Oregon Supreme Court failed to follow *Nollan* at every step of the analysis. The court gave no consideration to whether there exists any reason that could justify denial of the permit without the property dedications. The court simply accepted at face value the city's assertions that there would be some effect on transportation and storm water runoff. The fact that the city approves many applications that have similar effects and does not require property dedications was of no concern to the Oregon court.

The Oregon Supreme Court's consideration of the critical relationship between the dedication being required and the burdens imposed on the public by her proposed enlargement of her building was cursory at best. The court considered only whether some bare theoretical connection existed and never inquired, as required by the Fifth Amendment, into the closeness of that relationship either in terms of the character or degree of the burdens imposed. In particular, the court failed to consider the significance to Mrs. Dolan's taking claim that

the permit conditions she challenged exacted a fee simple absolute interest in 7000 square feet of her private land – almost ten percent of the total fee.[13] Only Justice Peterson, in dissent, saw that as significant: "If . . . the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely *why* the need in fact exists is a modest burden to place on the government." Pet. App. A. p. A-29 (emphasis in original) (Peterson, J., dissenting).

Under the "test" applied by the majority of the Oregon Supreme Court, the only relationship required to enable a city to exact full fee ownership of property is some possibility that the property might be used in a way that relates to any identifiable effect of the proposed use on the community. One or two additional customers at the enlarged store justifies taking total fee ownership of whatever land the city might apply to transportation purposes at the site. A "thimble full" of additional rain water runoff justifies taking full fee ownership of whatever property the city might use for drainage facilities at that site.

The level of "scrutiny" applied by the Oregon court provides no meaningful protection against the utilization of the police power to take private property without payment of just compensation. Virtually every land use

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[13] In *Nollan*, the property interest unconstitutionally exacted was a public access easement. 483 U.S. at 828. In the instant case, the city is exacting the complete fee interest in 7000 square feet of land – a far more burdensome and significant infringement on constitutionally-protected property rights.

application will have many at least incidental effects on the community. Even the most elementary commercial use, a 15 square foot coffee kiosk,[14] for example, will reduce open space, increase refuse, increase storm water runoff, and create transportation demands. If it is "reasonable to assume," as the city did in this case, that such effects will result from almost any land use application, then any dedication of any legal interest covering any area of the property would survive judicial review if the city's staff is only marginally intelligent enough to state such assumptions and to claim that the city might be able to use the dedicated property to respond in some way to those effects on the community.

If the Oregon Supreme Court had applied heightened scrutiny, and, like the dissenting Justice Peterson, had made a discerning inquiry[15] into the city's articulated justification for requiring the dedication of the greenway and pedestrian and bicycle pathway, the court would have found the city's demand for dedication of Mrs.

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[14] The city's CDC identifies both "eating and drinking establishments" and "food and beverage" sales as a permitted use in the CBD zone. App. C-2 (CDC § 18.66.030.A.2). The CDC also subjects permitted uses that are new developments or major modifications to the site development review conditions that were applied to Mrs. Dolan's application. *See* Br. in Opp. App. B, p. B-1 (CDC § 18.120.020).

[15] Under heightened scrutiny, judicial review in Oregon of the legal sufficiency of city findings to satisfy this Court's "essential nexus" is a question of law, and is reviewed *de novo*. *State v. Herbert*, 302 Or. 237, 241, 759 P.2d 547 (1986).

Dolan's property did not substantially advance a legitimate state interest that could justify denial of the application.

CONCLUSION

The City of Tigard's comprehensive plan and land use regulations are intended to achieve completion of the city's greenway and pedestrian/bicycle pathways, parts of which have already been acquired by the city, by demanding land from persons proposing any kind of development near Fanno Creek. This is done in advance of any application – by virtue of city code requirements – and without regard to the impacts of that development. In fact, completing the city's park and transportation system is a responsibility of the city's residents as a whole. Riparian property owners who desire legitimate use of their lands – reasonable and beneficial uses which meet all standards for approval – should not be unfairly and unjustly singled out to finance the costs of providing public recreational and transportation facilities for the city's residents.

The city failed to find that its demand that Mrs. Dolan give up the fee interest in 7000 square feet of her land was reasonably proportional, in both character and degree, to the direct, quantifiable burdens on municipal services caused by the Dolans' proposed store expansion. This Court made clear in *Nollan* that such a close fit was required. The city ignored that requirement and made an unconstitutional decision when it demanded 7000 square

feet of Mrs. Dolan's private commercial property from her.

In upholding the city's scheme, the Oregon Supreme Court overlooked the very purpose of the Federal Constitution's takings clause. That purpose is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Nollan*, 483 U.S. at 835-836 n.4 (citation omitted). The decision of the court below completely ignores this purpose.

The precedent established by the Oregon Supreme Court licenses the unconstitutional activities of the city, operating under its comprehensive plan and land use regulations. That plan and those regulations were encouraged by the state to include compensatory measures and other provisions to avoid unduly infringing on the rights of aggrieved landowners. The City of Tigard chose to ignore those compensatory measures and take the cheap and easy route to secure the public benefits of a greenway, enhanced storm drainage, and pedestrian and bicyclist recreational facilities along Fanno Creek. The city decided to demand those benefits by unfairly and unjustly singling out riparian landowners to dedicate the necessary land, and construct the pathway, when they sought new or more productive use of their lands.

Petitioner respectfully urges this Court to reverse the decision of the Oregon Supreme Court, and hold that the City of Tigard violated the Fifth and Fourteenth Amendments to the U.S. Constitution when it required dedication of 7000 square feet of Mrs. Dolan's private property as a condition of site development approval for her new

plumbing and electrical supply store in downtown Tigard.

DATED: January 13, 1994.

Respectfully submitted,

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APPENDIX A

OAR 660-15-000 (5)

5. OPEN SPACES, SCENIC AND HISTORIC AREAS, AND NATURAL RESOURCES

GOAL

To conserve open space and protect natural and scenic resources.

Programs shall be provided that will

(1) insure open space,

(2) protect scenic and historic areas and natural resources for future generations, and

(3) promote healthy and visually attractive environments in harmony with the natural landscape character. The location, quality and quantity of the following resources shall be inventoried:

a. Land needed or desirable for open space;

b. Mineral and aggregate resources;

c. Energy sources;

d. Fish and wildlife areas and habitats;

e. Ecologically and scientifically significant natural areas, including desert areas;

f. Outstanding scenic views and sites;

g. Water areas, wetlands, watersheds and groundwater resources;

h. Wilderness areas;

i. Historic areas, sites, structures and objects;

j. Cultural areas;

k. Potential and approved Oregon recreation trails;

l. Potential and approved federal wild and scenic waterways and state scenic waterways.

Where no conflicting uses for such resources have been identified, such resources shall be managed so as to preserve their original character. Where conflicting uses have been identified the economic, social, environmental and energy consequences of the conflicting uses shall be determined and programs developed to achieve the goal.

Cultural Area – refers to an area characterized by evidence of an ethnic, religious or social group with distinctive traits, beliefs and social forms.

Historic Areas – are lands with sites, structures and objects that have local, regional, statewide or national historical significance.

Natural Area – includes land and water that has substantially retained its natural character and land and water that, although altered in character, is important as habitats for plant, animal or marine life, for the study of its natural historical, scientific or paleontological features, or for the appreciation of its natural features.

Open Space – consists of lands used for agricultural or forest uses, and any land area that would, if preserved and continued in its present use:

(a) Conserve and enhance natural or scenic resources;

(b) Protect air or streams or water supply;

(c) Promote conservation of soils, wetlands, beaches or tidal marshes;

(d) Conserve landscaped areas, such as public or private golf courses, that reduce air pollution

and enhance the value of abutting or neighboring property;

(e) Enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries or other open space;

(f) Enhance recreation opportunities;

(g) Preserve historic sites;

(h) Promote orderly urban development.

Scenic Areas – are lands that are valued for their aesthetic appearance.

Wilderness Areas – are areas where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. It is an area of undeveloped land retaining its primeval character and influence, without permanent improvement or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) may also contain ecological, geological, or other features or scientific, educational, scenic, or historic value.

GUIDELINES

A. PLANNING

1. The need for open space in the planning area should be determined, and standards developed for the amount, distribution, and type of open space.

2. Criteria should be developed and utilized to determine what uses are consistent with open space values

and to evaluate the effect of converting open space lands to inconsistent uses. The maintenance and development of open space in urban areas should be encouraged.

3. Natural resources and required sites for the generation of energy (i.e. natural gas, oil, coal, hydro, geothermal, uranium, solar and others) should be conserved and protected; reservoir sites should be identified and protected against irreversible loss.

4. Plans providing for open space, scenic and historic areas and natural resources should consider as a major determinant the carrying capacity of the air, land and water resources of the planning area. The land conservation and development actions provided for by such plans should not exceed the carrying capacity of such resources.

5. The National Register of Historic Places and the recommendations of the State Advisory Committee on Historic Preservation should be utilized in designating historic sites.

6. In conjunction with the inventory of mineral and aggregate resources, sites for removal and processing of such resources should be identified and protected.

7. As a general rule, plans should prohibit outdoor advertising signs except in commercial or industrial zones. Plans should not provide for the reclassification of land for the purpose of accommodating an outdoor advertising sign. The term "outdoor advertising sign" has the meaning set forth in ORS 377.710(24).

B. IMPLEMENTATION

1. Development should be planned and directed so as to conserve the needed amount of open space.

2. The conservation of both renewable and non-renewable natural resources and physical limitations of the land should be used as the basis for determining the quantity, quality, location, rate and type of growth in the planning area.

3. The efficient consumption of energy should be considered when utilizing natural resources.

4. Fish and wildlife areas and habitats should be protected and managed in accordance with the Oregon Wildlife Commission's fish and wildlife management plans.

5. Stream flow and water levels should be protected and managed at a level adequate for fish, wildlife, pollution abatement, recreation, aesthetics and agriculture.

6. Significant natural areas that are historically, ecologically or scientifically unique, outstanding or important, including those identified by the State Natural Area Preserves Advisory Committee, should be inventoried and evaluated. Plans should provide for the preservation of natural areas consistent with an inventory of scientific, educational, ecological, and recreational needs for significant natural areas.

7. Local, regional and state governments should be encouraged to investigate and utilize fee acquisition, easements, cluster developments, preferential assessment, development rights acquisition and similar techniques to implement this goal.

8. State and federal agencies should develop statewide natural resource, open space, scenic and historic area plans and provide technical assistance to local and regional agencies. State and federal plans should be reviewed and coordinated with local and regional plans.

9. Areas identified as having non-renewable mineral and aggregate resources should be planned for interim, transitional and "second use" utilization as well as for the primary use.

APPENDIX B

OAR 660-15-000 (12)

12. TRANSPORTATION

GOAL

To provide and encourage a safe, convenient and economic transportation system.

A transportation plan shall (1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian; (2) be based upon an inventory of local, regional and state transportation needs; (3) consider the differences in social consequences that would result from utilizing differing combinations of transportation modes; (4) avoid principal reliance upon any one mode of transportation; (5) minimize adverse social, economic and environmental impacts and costs; (6) conserve energy; (7) meet the needs of the transportation disadvantaged by improving transportation services; (8) facilitate the flow of goods and services so as to strengthen the local and regional economy; and (9) conform with local and regional comprehensive land use plans. Each plan shall include a provision for transportation as a key facility.

Transportation – refers to the movement of people and goods.

Transportation Facility – refers to any physical facility that moves or assists in the movement of people and goods excluding electricity, sewage and water.

Transportation System – refers to one or more transportation facilities that are planned, developed, operated and maintained in a coordinated manner to supply

continuity of movement between modes, and within and between geographic and jurisdictional areas.

Mass Transit – refers to any form of passenger transportation which carries members of the public on a regular and continuing basis.

Transportation Disadvantaged – refers to those individuals who have difficulty in obtaining transportation because of their age, income, physical or mental disability.

GUIDELINES

A. PLANNING

1. All current area-wide transportation studies and plans should be revised in coordination with local and regional comprehensive plans and submitted to local and regional agencies for review and approval.

2. Transportation systems, to the fullest extent possible, should be planned to utilize existing facilities and rights-of-way within the state provided that such use is not inconsistent with the environmental, energy, land-use, economic or social policies of the state.

3. No major transportation facility should be planned or developed outside urban boundaries on Class I and II agricultural land, as defined by the U.S. Soil Conservation Service unless no feasible alternative exists.

4. Major transportation facilities should avoid dividing existing economic farm units and urban social units unless no feasible alternative exists.

5. Population densities and peak hour travel patterns of existing and planned developments should be considered in the choice of transportation modes for trips taken by persons. While high density developments with concentrated trip origins and destinations should be designed to be principally served by mass

transit, low-density developments with dispersed origins and destinations should be principally served by the auto.

6. Plans providing for a transportation system should consider as a major determinant the carrying capacity of the air, land and water resources of the planning area. The land conservation and development actions provided for by such plans should not exceed the carrying capacity of such resources.

B. IMPLEMENTATION

1. The number and location of major transportation facilities should conform to applicable state or local land use plans and policies designed to direct urban expansion to areas identified as necessary and suitable for urban development. The planning and development of transportation facilities in rural areas should discourage urban growth while providing transportation service necessary to sustain rural and recreational uses in those areas so designated in the comprehensive plan.

2. Plans for new or for the improvement of major transportation facilities should identify the positive and negative impacts on: (1) local land use patterns, (2) environmental quality, (3) energy use and resources, (4) existing transportation systems and (5) fiscal resources in a manner sufficient to enable local governments to rationally consider the issues posed by the construction and operation of such facilities.

3. Lands adjacent to major mass transit stations, freeway interchanges, and other major air, land and water terminals should be managed and controlled so as to be consistent with and supportive of the land use and development patterns identified in the comprehensive plan of the jurisdiction within which the facilities are located.

4. Plans should provide for a detailed management program to assign respective implementation roles and responsibilities to those governmental bodies operation in the planning area and having interests in carrying out the goal.

APPENDIX C

TIGARD
COMMUNITY DEVELOPMENT CODE

TITLE 18
ZONING

. . . .

Chapter 18.66

CBD: CENTRAL BUSINESS DISTRICT

. . . .

18.66.030 Permitted Uses

A. Permitted uses in the CBD district are as follows:

1. Civic use types:

   a. Public administrative agency;

   b. Community recreation;

   c. Cultural exhibits and library services;

   d. Lodges, fraternal, and civic assembly;

   e. Parking facilities;

   f. Postal services;

   g. Public safety services;

   h. Public support facilities; and

   i. Religious assembly;

2. Commercial use types:

   a. Amusement enterprises;

   b. Animal sales and services:

      (i) Grooming; and

(ii) Veterinary, small animals;

c. Automotive and equipment:

(i) Cleaning; and

(ii) Repairing, light equipment;

d. Building maintenance services;

e. Business equipment sales and services;

f. Business support services;

g. Communication services;

h. Convenience sales and personal services;

i. Eating and drinking establishments;

j. Financial, insurance, and real estate services;

k. Food and beverage sales;

l. Medical and dental services;

m. Participation sports and recreation:

(i) Indoor; and

(ii) Outdoor;

n. Personal services, general;

o. Professional and administrative services;

p. Religious assembly;

q. Repair services, consumer;

r. Retail sales, general;

s. Transient lodging;

3. Residential Use Types (See R-40 and R-12 for development standards):

a. Single-family attached residential units;

b. Multiple-family residential units; and

c. Home occupations subject to provisions of Chapter 18.142.

d. The CBD zoning district allows for R-40 residential development except within the area south of Fanno Creek defined as follows:

e. All lands bounded by Fanno Creek, Hall Boulevard, Omara, Ash Avenue and Hill Street within the CBD shall be designated R-12 PD and shall be developed as planned developments in conformance with the R-12 district standards. (Ord. 89-06; Ord. 86-08; Ord. 84-73; Ord. 83-52)

Supreme Court, U.S.
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(29)

No. 93-518

In the Supreme Court of the United States

OCTOBER TERM, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari To
The Oregon Supreme Court

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129 pp

QUESTION PRESENTED

Respondent City of Tigard conditioned Petitioner's major modification of her commercial development in the City's downtown on Petitioner's dedicating to the public an easement on a fraction of her property to allow the City to mitigate (i) the increased storm water flow resulting from the development into a creek already prone to flooding and (ii) the increased traffic congestion resulting from the development in an area already subject to congestion problems.

The question presented is whether the City's imposition of this condition amounted to an unconstitutional taking of private property in violation of the Fifth and Fourteenth Amendments, where the condition substantially advanced the City's legitimate interests in preventing flooding and mitigating traffic congestion and those same interests would have allowed the City to prohibit the development.

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Gregory Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 Const. Commentary 259 (1992) 22

5 Robert M. Anderson, American Law of Zoning 3d (1986) 44

Arthur C. Nelson, *Public Provision of Pedestrian and Bicycle Access Ways: Public Policy Rationale and the Nature of Private Benefits* (Center for Planning Development, Georgia Institute of Technology, Working Paper Series, 1994) 36, 42, 43, 45

R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 Law & Contemp. Probs. 5 (1987) 45

J.C. Vance, *Exaction of Right of Way by Exercise of Police Power*, in 2 R.D. Netherton, Selected Studies in Highway Law 936-N227 (1988) 44, 45

1 Norman Williams, Jr., American Planning Law § 5B.05 (1988 rev. supp 1993) 24

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CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The relevant constitutional provision is the Takings Clause of the Fifth Amendment to the Constitution of the United States[1] as applied to the states through the Fourteenth Amendment. Statutory provisions and municipal ordinances are set forth in an appendix to this brief.[2]

STATEMENT

A. Petitioner's Application for a Major Modification of Her Store

Petitioner Florence Dolan is the owner of a chain of plumbing/hardware supply stores in the Portland, Oregon, metropolitan area. One of her stores is located in Tigard, a suburb with the population of 29,344 people, 1990 Census of Population (June 1992), which abuts Portland's southwest boundary and is within the Portland area urban growth boundary. In March, 1991, Petitioner filed an application seeking Respondent City of Tigard's approval of Petitioner's undertaking a major modification of the existing commercial development on property Petitioner owns in downtown Tigard. Petitioner's application included requests for variances from development code requirements. App E3.

Petitioner's proposed modification is the first step in a two-step project. Petitioner plans to start a second phase of retail development on the property at a later time. JA 3, Pet.

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[1] "[N]or shall private property be taken for public use without just compensation."

[2] The City's Comprehensive Plan (with Public Facilities Plan) has been lodged with the Court.

Cert. G9. The application at issue here describes plans to tear down the existing 9,700 square foot building and to replace it with a 17,600 square foot building. Petitioner also plans to replace a partially graveled parking lot with a paved parking lot having 39 spaces on the 1.67 acre site. Pet. Cert. G8, 9.

Petitioner's property is located on Main Street in Tigard, at the heart of the City's downtown central business district. R-Doc. No. B 51.[3] The property abuts Fanno Creek on the east side. JA 3. Pet. Cert. G8. The property is zoned CBD, Central Business District, and is also subject to another zone called AA, Action Area Overlay. Pet. Cert. G6. CBD zoning allows for many land uses. Examples include retail sales, civic uses, meeting halls, offices, restaurants, motels and high density residential (40 units per acre). CDC § 18.66.030.[4] All allowed uses are available to Petitioner.

The Action Area Overlay Zoning District, CDC Chapter 18.86, applies in areas of intensive land uses. CDC § 18.86.010. Its requirements are meant to ensure that projected public facility needs, pursuant to CDC Chapter 18.164, are addressed during redevelopment and intensification of use in the area. CDC § 18.86.040.A.

The intensity of the project controls the scope of the zoning review process. A change in use having major impacts on public facilities is classified as a "major modification" of an existing development and is subject to a

[3] "R-Doc. No. -" refers to the record letter assigned by the Oregon Supreme Court to items in the record in its Clerk's docket sheet. R-Doc. B 51 is found at App E2.

[4] "CDC" refers to the City of Tigard Community Development Code. The CDC sections cited are found in Appendix B.

discretionary approval process called "site development review." CDC § 18.120.020.A. A "minor modification" is not subject to site development review. CDC § 18.120.020.A.4. Petitioner does not dispute the threshold classification of the application as a "major modification."

Petitioner's March 1991 application was not her first attempt to get the City's approval of her proposed commercial development. In 1989, she filed an application based on virtually the same plan. Pet. Cert. G6. The City approved that first application, but made the approval subject to conditions. One condition was virtually identical to the condition now at issue. It required Petitioner to dedicate easements to allow the City to address flood hazards and traffic congestion, problems caused by the proposed development. Pet. Cert. D6 n.6.

Petitioner appealed the easement condition in the City's first approval to the Oregon Land Use Board of Appeals ("LUBA").[5] Petitioner argued that the flood plain dedication was a taking without compensation, violating the Fifth and Fourteenth Amendments to the United States Constitution. LUBA refused to decide Petitioner's takings challenge because she had failed to seek a variance:

> "Because the variance process of TCDC Chapter 18.134 provides petitioners with the means of seeking administrative relief from the disputed condition requiring dedication of a portion of their property, and petitioners have not pursued that

[5] LUBA is the first body to review local government land use decisions, and it has exclusive jurisdiction over such decisions. Oregon Revised Statutes ("ORS") § 197.825(1) (1993). For a full description of the Oregon state law framework for land use planning, see Briefs of Amici State of Oregon and 1,000 Friends of Oregon/American Planning Association.

relief, petitioners' federal and state taking claims are not ripe for review." Pet. Cert. E22.

Petitioner did not appeal LUBA's decision, but instead filed her March 1991 application. That application sought the variance LUBA had found lacking in Petitioner's initial application and is the application directly at issue in this case.

Petitioner had the burden to prove that she had satisfied all of the Tigard Development Code's requirements. CDC § 18.32.250.A.1. Petitioner's one-half page statement attempting to justify a variance, App E4, did not, however, contain the information that the City Code requires relating to storm drainage and traffic impacts, including an analysis of the impact of the development on the City's storm drainage and traffic systems. CDC §§ 18.32.050, 18.84, 18.120.090, .100, 18.164.030 and 18.164.100.[6]

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[6] The cited CDC sections when read together implement the comprehensive plan requirement that development address storm drainage and traffic impacts. With regard to drainage, the City's comprehensive plan provides in relevant part:

> "The City shall require as a precondition to development that:
>
> > "a. the site development study be submitted for development in areas subject to poor drainage, ground instability or flooding which shows that the development is safe and will not create adverse off-site impacts;
> >
> > "b. natural drainage ways be maintained unless submitted studies show that alternative drainage solutions can solve on-site drainage problems and will ensure no adverse off-site impacts."
>
> Comprehensive Plan Policy 7.2.1 p. II-43, App A29-30.

> "Proper administration of the floodplain areas relies heavily upon the availability of adequate information upon which to assess the environmental impacts of a project. The development, which creates the need, should be responsible for providing the city with the necessary data for making sound decisions. The burden is on the applicant to prove that a project will not adversely affect the environment or create undue future liabilities for the city." Comprehensive Plan Policy 3.2 Floodplains, Findings, p. II-14, App A20-21.

These policies are in turn implemented through the Sensitive Lands Chapter (CDC § 18.84) and Utilities Standards Requirements for Storm Drainage (CDC § 18.164.100).

Similarly, the comprehensive plan addresses transportation facilities by requiring that infrastructure be capable of serving the proposed development (Comp. Plan Policy 7.1.2(b)(1), App A27). This provision implements Statewide Planning Goal 11, "Public Facilities and Services," App D1-3, which mandates that urban development must be supported by appropriate levels of public facilities and that cities must plan for key facilities. "Key facility" is defined to include transportation. App D4. To address this requirement, the CDC requires the applicant to submit a site plan detailing existing and proposed streets, ways and easements, including those on surrounding properties. CDC § 18.120.120.A.3.

The exact nature of the street, sidewalk and bikeway improvements required of each development depends on the facts of the specific application. CDC § 18.164.020.B ("The City Engineer may recommend changes or supplements to the standard specifications consistent with the application of engineering principles."); CDC §§ 18.164.030, 18.164.070, 18.164.110. Developments that will "principally benefit" from bikeways identified on the adopted pedestrian/bikeway plan are required to be conditioned to include the cost of bikeway improvements. CDC § 18.164.110.B.

Petitioner likewise failed to use her opportunity to prove facts related to applicable standards through the introduction of evidence of the "possible negative or positive attributes of the proposal" or that there had been changes or mistakes in the comprehensive plan or the zoning map as it related to her application. CDC § 18.32.250.B. The submission of an incomplete application does not "negate the applicant's burden of proof." CDC § 18.32.050.G.

Based on the lack of information in Petitioner's variance application on drainage and transportation impacts, the City could have denied the application. CDC §§ 18.32.250.A, .E, 18.10.010, 18.16.010.B. Instead, the City undertook to evaluate the application based on facts otherwise available, as allowed by CDC § 18.32.060, and the City held a hearing on the matter. R-Doc. No. B 36. The City based its evaluation on studies and planning undertaken in fulfillment of its land use planning and regulation responsibilities. That information was available because, since the early 1970s, the City of Tigard, like all Oregon cities, has prepared extensive land use studies and plans to meet the requirements of state law.

B. Flood Control Planning

In 1978 the City undertook an engineering analysis of the City's drainage basins. R-Doc. No. F, Introduction, 3-1, Comprehensive Plan p. I 192-94, p. II 11-15. App A1-4, 15-24. That analysis resulted in the Tigard Master Drainage Plan (the "Drainage Plan"). R-Doc. No. F. The data within that plan serves as the basis for the City's Comprehensive Plan policies and regulatory provisions relating to floodplain management. Plan p. II 13-15, 42, App A19-24, 28-29; CDC § 18.164.100.D. The Drainage Plan documented the mild wet weather associated with Western Oregon's maritime climate and that flooding occurred in several areas along

Fanno Creek, including areas near Petitioner's property.[7] R-Doc. No. F 2-5 to 2-8; 4-2 to 4-6; Figure 4.1.

The Drainage Plan further found that without proper planning of land uses in the drainage area, urbanization within the Fanno Creek basin will significantly increase these flooding problems.[8] Increased flooding discharge will result in a rise in the flood plain elevation. R-Doc. No. F 4-29, 5-1 to 5-8. The Plan described the behavior of rainfall and runoff on urban land. According to the Plan, much of the rainfall in an urban setting lands on impervious surfaces such as roofs, sidewalks, parking lots, driveways and roads. Those surfaces rapidly conduct the rainfall off the land through the drainage system into the most available natural stream or drainage feature. This increased flow rate results in higher runoff peaks unless the drainage system is modified either to slow the rate of runoff or to increase its ability to carry water. R-Doc. No. F 4-29, 30; Chapter 5. Petitioner's proposed larger building and parking lot will dramatically increase the amount of impervious surface on her property. It will therefore increase storm water flows into Fanno Creek. R-Doc. No. F 4-29, Pet. Cert. G37.[9]

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[7] The picture on the cover of the study is of the December 1977 flood of Fanno Creek at the Main Street bridge. R-Doc. No. F, cover. Petitioner's property is located adjacent to that bridge between Main Street and Hall Boulevard. App E2.

[8] "Hall Blvd. to Main St. . . . Several major industrial and commercial structures mostly on the east side of the creek are just barely out of the 100-year flood plain. An increase in the 100-year flood flow caused by future urbanization of the basin could create severe flooding problems in this reach of the creek." R-Doc. No. F 4-5.

[9] The study also found that impervious surfaces such as parking lots and roofs are pollution sources. The impact of these non-point source polluters varies directly with the location of the area in relation

The City's Drainage Plan also suggested a series of improvements to the Fanno Creek Basin, including improvements next to Petitioner's property. Pet. Cert. G38, R-Doc. No. F 5-13 to 5-21, 7-2 to 7-5. The Drainage Plan called for significant channel excavation in the area just below the Main Street bridge next to Petitioner's property. Pet. Cert. G13, R-Doc. No. F 7-4, Table 8.2. The Plan projected that the recommended improvements would prevent the 100-year flood elevation in the area of Petitioner's property from rising by approximately two to five feet.

> "However, upstream of Hall Boulevard, the flood stage reductions range from two feet to over five feet. The severe over-bank flooding problems documented in Chapter 4 will be eliminated if the recommended improvements are built." R-Doc. No. F 6-8.[10]

The Drainage Plan also analyzed costs and funding alternatives. In analyzing cost apportionment, the Plan concluded that cost should be shared based on benefit. R-Doc. No. F 8-11. It identified two types of benefits: direct and indirect. Indirect benefits, such as elimination of nuisance flooding of roadways and limitations on emergency

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to the drainage system. Sources that are farther from the storm drainage system and require overland flow have a very low pollutant yield when compared with parking lots or structures that are, like Petitioner's store, located next to the drainage system. R-Doc. No. F 4-17, 4-18.

[10] The 100-year flow elevation at Petitioner's site is approximately 150 feet. The finished floor elevation of the proposed new building is 2-½ feet above that, at 152.5 feet. JA 3. Implementation of the City's comprehensive plan policies and regulations are designed to result in a "0 foot rise" in the floodway elevation. Comp Plan p. II 14, Policy 3.2.2(a), App A22.

access, accrue to the general public and justify the imposition of costs upon the public as a whole. Property, like that of Petitioner, which is located next to waterways, however, receives significant direct benefits from increased flood protection. The Drainage Plan accordingly recommended that property owners receiving direct benefits pay the greater cost associated with those benefits. R-Doc. No. F 8-11.

The City's Drainage Plan concluded with suggestions and recommendations for implementing ordinances. Those recommendations included insuring that flood plains remain free of structures, that areas in and near the flood plain be preserved as greenways or greenbelts to minimize flood damage to structures and to enhance joint use, that a site analysis be conducted at the time of development, that equitable cost sharing between the public and benefitted property owners occur, and that the 100-year flood plain be preserved by adoption of a sensitive lands ordinance, zoning and deeds for easements. R-Doc. No. F Chapter 9, 5-16 to 5-21. CDC Chapters 18.84, 18.86 and CDC § 18.164.100 and the Tigard Park Plan, R-Doc. No. E, carry out these recommendations. A major component of the park plan is the utilization of greenways which are identified as riparian areas, including Fanno Creek. R-Doc. No. E5. The greenway boundary is coterminous with that of the floodplain. App A21. Pursuant to the Tigard Park Plan, a specific Fanno Creek Park Plan has been adopted by the City. R-Doc. No. D 6-10. The concept of joint use of the floodplain for storm drainage, recreation and transportation is built into this plan through integration of the pedestrian/bikeway plan, R-Doc. No. C, App A9-14, with a recognition that whatever features or facilities are located in the park must be compatible with and tolerant of periodic flooding. R-Doc. No. D 6.

In reviewing Petitioner's application for a major modification of her downtown commercial property, the City's staff applied the standards set forth in CDC § 18.164.100, relating to storm drainage management.[11] Those standards require implementation of the improvement recommendations of the Drainage Plan. CDC § 18.164.100.C, .D. The Code calls for a site specific analysis of each development's effect on the storm water system. If, based on such analysis, the City finds that the proposed development will adversely impact the storm drainage system, the Code requires the City to withhold approval or impose mitigating conditions. CDC § 18.164.100.D.

In approving Petitioner's application, with conditions, the City did not require Petitioner to make structural improvements to the flood plain at her own expense, even though the Drainage Plan called for such improvements along the frontage of this property on Fanno Creek. Pet. Cert. G13, R-Doc. No. F 7-4, Table 8.2. The City required Petitioner only to dedicate an easement so that public agencies would be able to enter into the Fanno Creek drainage area to build and maintain there at public expense the improvements necessary to reduce flood hazards, including those threatening Petitioner's property. Pet. Cert. G38, G40-43.

C. Transportation Planning

Pursuant to the state's requirement that the City, like all other Oregon cities, plan for its future urban transportation

[11] Compliance with CDC Chapter 18.164 is required for site development review approval. CDC § 18.120.180.A.1.m.

needs,[12] the City completed a transportation study that considered all modes of transportation. Comprehensive Plan p. I 220-73. The City's plan includes the comprehensive pedestrian-bicycle pathway plan which was originally adopted in 1974. App A9-14, R-Doc. No. C. In developing the transportation element of the comprehensive plan, the City recognized that congestion caused by vehicles is a major problem in Tigard. App A34. The planning effort was based upon underlying judgments that bicycle and pedestrian pathway systems will reduce automobile trips and thereby reduce congestion. App A7. These modes of travel are intended to provide the opportunity to replace short vehicle trips for shopping purposes. App A5.

The Plan's criteria for path selection included reducing hazards on roads and providing safe access to schools, recreation areas, and major shopping areas. App A10. The Plan identified downtown Tigard, where Petitioner's site is located, as one of the major shopping areas. App A11. It also identified congestion in Tigard's downtown as a particular problem. It noted that Main Street, Pacific Highway and Hall Boulevard, the major streets serving Petitioner's property, are severely congested. App A31. The Plan found that bike paths can reduce auto-related congestion. App A7. The Plan thus called for careful planning of a system of bicycle and pedestrian pathways to integrate and facilitate access to shopping areas. App A6.[13]

[12] Statewide Planning Goal 12. App D3-4.

[13] Pursuant to the Plan, the City in 1982 added 3.7 miles of bike and pedestrian pathways through a combination of funding from street overlay and widening programs and contributions by adjacent development. App A8. By the time of Plan adoption, there were approximately 40 miles of sidewalk and bike paths in the City. App A6. 364,000 dollars of a 1989 voter-approved bond issue were spent on bike path construction projects. Public Facilities Plan p. 16. The 3-year capital improvement program

This path follows Fanno Creek and will connect Petitioner's store with the Civic Center and employment center along Hall Boulevard. App A14. Petitioner's property is located at the intersection of this pedestrian connection with Main Street. App E2.

The Action Area Overlay Zoning District requires that development facilitate pedestrian/bikeway circulation through the dedication of land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan. CDC § 18.86.040.A.1.b. These requirements are flexible. CDC § 18.164.110 regulates the extent of the dedication and construction requirement for each project. It provides a range of such requirements, depending on the particular benefit that the development will receive from the path. The condition here requires only the dedication of an easement for pathway purposes and does not require construction. Pet. Cert. G43.[14]

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adopted in 1991 includes $455,000 for specific bikeway improvements, and identifies pedestrian or bicycle path improvements as a specific portion of another $6,090,000 worth of transportation improvements. Public Facilities Plan p. 12, 13 (lodged with the Court).

[14] The City's final decision approves Petitioner's application subject to conditions. Pet. Cert. G43. The only condition related to the bike path is condition 1, which never mentions a construction requirement.

> "1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area."

To impose a bikeway construction requirement, the City must conclude that the development will "principally benefit" from the improvement. CDC § 18.164.110.B. The order contains no such

D. Adjustment Mechanisms

The CDC contains mechanisms that allow for adjustments to code standards to respond to the impacts of each individual project. First, the CDC directs city decision makers to consider any factual evidence from the parties relevant to existing conditions and applicable standards and criteria, and the possible negative or positive attributes of the proposal. CDC § 18.32.250.B. In response to such evidence, the City Engineer will determine whether adjustments in applicable city standards are warranted. CDC § 18.164.020.B.

In addition, CDC Chapter 18.134 permits an applicant to seek a variance to gain changes to otherwise mandatory Code requirements. The variance mechanism is intended to provide for a site-specific, case-by-case analysis of special circumstances, and to allow for a modification of standards to address those circumstances. CDC § 18.134.050. The City Council decided that Petitioner had failed to show that the variance request satisfied the variance approval criteria. Pet. Cert. G43. Petitioner did not appeal this portion of the City Council decision. *See* Petitioner's assignments of error before LUBA. Pet. Cert. D6, 7, 17.

E. The City's Conditional Approval

Based on Petitioner's application and argument, and considering its ordinances and planning studies, the City approved the application, with conditions. Pet. Cert. G43.

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conclusion, and as a result, no construction requirement is imposed. Oregon law requires that great deference be given to a local government's interpretation of its land use regulations. ORS § 197.829; *Clark v. Jackson County*, 313 Or. 508, 836 P.2d 710 (1992).

The City made findings that the development would increase storm water runoff into the creek, thereby increasing flood risks:

> "[T]he Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek." Pet. Cert. G37.
>
> "The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, the Commission finds that the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." Pet. Cert. G37.
>
> "If the area within the 100-year floodplain is not dedicated as the variance application requests, the existing storm water drainage system would be affected because additional storm water runoff resulting from additional development, both from the subject site and elsewhere within the Fanno Creek drainage basin, is expected to increase flow

> within the creek and a rise in the 100 year flood elevation without the public's ability to make channel modifications in this area to offset the increase in stream flow." Pet. Cert. G40.
>
> "If dedication is required as specified by the Code, the channel of Fanno Creek in this area could be improved by public agencies as called for by the Master Drainage Plan. These channel improvements, here and elsewhere along the creek, would be expected to improve the channel's ability to transmit storm water flows thereby reducing the 100 year flood elevation and reducing the possibility of floodwater damages and threats to public safety." Pet. Cert. G40.

In imposing the conditions, the City made explicit findings that the decision was based on the studies in the Comprehensive Plan and the Drainage Plan:

> "As already noted, the Code at Section 18.120.080.A.8 and many other related sections (*e.g.*, Section 18.84.040.A.7) require dedication of floodplain areas . . . primarily to allow for public management of the storm water drainage system. These Code sections carry out Comprehensive Plan Policy 3.2.4 which requires dedication of all undeveloped land within the 100-year floodplain. Volume Two of the Plan at Section 3.2 discusses the City's objectives in regulating development within and adjacent to floodplain areas to avoid hazards to the public and to downstream properties. Volume One of the Comprehensive Plan at pages 192 and 193 provides a discussion of the reasons for development of a coordinated City-wide storm

> water management system. Volume One of the Plan also cites the Master Drainage Plan for the City produced by CH2M Hill Inc. [sic] in 1981 for a further discussion of the need for public management of the storm water drainage system and for measures intended to increase the flow efficiency of Fanno Creek and other drainage channels in the city." Pet. Cert. G38.

Petitioner asked to be excepted from the general rule, but she did not offer any evidence that the studies and planning results showing increased storm water impacts from development did not apply to her property. Pet. Cert. G37.

In evaluating the variance, the City also took into account its effect on the unusable portion of Petitioner's property located in the floodplain:

> "The requested variance to omit floodplain dedication would not affect possible uses permitted by the Code for this property. Dedication of the portion of the property within the 100-year floodplain of Fanno Creek would not be expected to diminish the usability or value of the property because the 100-year floodplain area is virtually unusable due to the year-round water flow of the Creek within a well defined narrow channel." Pet. Cert. G39, G40.

> "The Planning Commission finds that the applicant has failed to state what hardship would exist related to the requirement for floodplain dedication since this floodplain area is not buildable land under the City's regulations because the land in question within the floodplain

> is primarily the actual stream channel of Fanno Creek." Pet. Cert. G41.

At Petitioner's request, the easement area to be dedicated to the City as a result of Condition No. 1, will be treated as satisfying part of the mandatory landscaping requirements for the project. Pet. Cert. G28, G29.[15] Condition No. 4 requires the City at public expense to landscape the dedicated land. Pet. Cert. G45. Also at Petitioner's request, the City removed the requirement that Petitioner provide a land survey, transferring that cost to the public. Pet. Cert. G44, R-Doc. No. B36-38.

Condition No. 1 also requires the dedication of 15 feet along the floodplain for the bicycle/pedestrian path.[16] The City found that the proposed development is "anticipated to generate additional vehicular traffic" increasing congestion on nearby streets. Pet. Cert. G24. Based upon the retail sales nature of the larger building, the development is estimated to create 53.21 trips per week, per thousand square feet of

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[15] The honoring of that request resulted in Condition No. 4 of the approval, which required the submission of a revised landscaping plan showing the dedicated land noted in Condition No. 1 as included in the required landscaped area. Pet. Cert. G44, G45.

[16] Petitioner incorrectly claims that the City required her to transfer fee simple title. The City's authority to impose conditions upon approval of a site development application is granted by CDC § 18.32.250.E.2. That code section allows conditions to include the "dedication of easements." Condition No. 1 thus does not require the transfer of fee simple title. *See Portland Baseball Club v. City of Portland*, 142 Or. 13, 16, 18 P.2d 811, 812 (1933) ("In this state the rule is that where land has been dedicated or appropriated for a public street the fee in the street remains in the original owner subject only to the public easement and, upon the vacation of the street, it reverts to the owner of the abutting premises freed from the easement.").

gross floor area (approximately 937 trips). Pet. Cert. G14, G15.

The City further found that the required bicycle path connecting Petitioner's property to the Civic Center and the City's main employment center along Hall Boulevard, App E2, will help mitigate the increased traffic on the City's already congested streets.

> "Creation of a convenient, safe pedestrian/bicycle pathway [sic] system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." Pet. Cert. G24.

> "It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." Pet. Cert. G24.

F. History of Administrative and Judicial Review

Petitioner appealed the City's order to LUBA, challenging only the constitutionality of the dedication requirement. She did not challenge the findings or the sufficiency of the evidence supporting the City's decision. LUBA affirmed and the Oregon Court of Appeals, in turn, affirmed LUBA's decision.

The Oregon Supreme Court likewise affirmed. Like the two preceding tribunals, the court concluded that Petitioner had not challenged the City's factual findings or public purposes, and that the focus of her assignments of error was limited to her interpretation of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The Oregon Supreme

Court held that the City's uncontested findings established the connection between the development's impacts and the exaction required by *Nollan*. Justice Peterson dissented.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the City struck an appropriate balance between Petitioner's private interest and that of the public by approving Petitioner's application to undertake a major modification and expansion of her existing retail business, but requiring Petitioner to mitigate the adverse impacts of the development. The conditions are well within the City's established police powers, because they substantially advance the City's legitimate interests in preventing flooding and mitigating traffic congestion. At the same time they do not amount to an unconstitutional taking of private property because the City could have denied Petitioner's permit application based on those same traffic congestion and drainage concerns, either alone or in combination with other development.

Contrary to Petitioner's claim, a municipality does not take private property in violation of the Fifth and Fourteenth Amendments when, instead of denying a development application based on legitimate public concerns, the City acts far less harshly by addressing those same concerns through conditions. Indeed, were the rule otherwise, the Takings Clause would discourage a municipality from engaging in the very "weighing of private and public interests" that the Clause seeks to promote. *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980). A municipality would be effectively required to deny development permits altogether to await completion of necessary public facilities rather than, as the City has done here, better accommodate commercial development projects by having each contribute a share to those planned facilities.

Nor, for that same reason, is there any merit to Petitioner's suggestion that any conditions that a municipality imposes must be subject to strict judicial scrutiny under the Takings Clause. Strict scrutiny does not generally apply to denials of applications to develop commercial property. It would therefore be wholly illogical, if not somewhat perverse, to apply such heightened judicial scrutiny whenever a municipality decided to make greater efforts at accommodation. Likewise, Petitioner's claim that the City must prove a precise symmetry between the condition and the impacts is without merit. Petitioner's major modification passed the threshold the City rationally established setting the point at which impacts justify exactions of this type.

In this case Petitioner's takings claim especially lacks merit because the City imposed a permit condition reasonably related in character and degree to the impacts that the City found Petitioner's greatly expanded store and parking lot to cause. Dedication of an easement is a reasonable response to the flood prevention and traffic congestion concerns directly related to Petitioner's proposed development. Unlike the landowner in *Nollan*, 483 U.S. 825, moreover, Petitioner will receive disproportionate benefits from the construction at public expense of drainage systems and pathways on those easements. The enhanced flood protection measures necessarily inure primarily to the benefit of those, like Petitioner, whose property is located in and along the floodplain. Efforts to reduce traffic congestion likewise disproportionately benefit those, like Petitioner, whose economic expectations depend on the public's easy access to their retail business.

Indeed, for this reason, Petitioner's reliance on this Court's decision in *Nollan* is entirely misplaced. The relative intrusiveness of an easement dedication on Petitioner's downtown commercial property bears scant

relation to the privacy and security interests of the Nollans in their beachfront residential property. Petitioner's store (unlike the Nollans' home) profits by inviting the public and from increased access. The condition also does not offend Petitioner's reasonable expectations. The store is located in the heart of the City's developing downtown, where significant infrastructure and improvement are inevitably necessary when major developments occur. Moreover, these improvements will have minimal adverse economic impact and, quite possibly, will increase the market value of Petitioner's property.

Rather than amounting to a mere subterfuge for taking Petitioner's property, the City's conditional approval of her commercial development plan reflected careful consideration of the impacts of such development in the City's downtown. Because Petitioner never used the available adjustment mechanisms to introduce evidence to support her claims that the project would not cause the adverse impacts the City projected, this Court should reject those claims here. This Court should affirm the judgment of the Oregon Supreme Court, rejecting Petitioner's takings claim.

ARGUMENT

THE CONDITION THAT THE CITY IMPOSED ON PETITIONER'S MAJOR MODIFICATION OF HER DOWNTOWN COMMERCIAL PROPERTY DID NOT RESULT IN A TAKING BECAUSE THE CONDITION SUBSTANTIALLY ADVANCED LEGITIMATE STATE INTERESTS AND WAS REASONABLY RELATED TO THE PROJECTED IMPACTS OF PETITIONER'S PROPOSED DEVELOPMENT

This case concerns a municipality's ability to allow a major commercial development in its central business district while taking those steps necessary to address the projected spillover effects of that development. Like the takings issue itself, a municipality's decision whether to approve a commercial development "necessarily requires a weighing of private and public interests." *Agins*, 447 U.S. at 261.[17] A judicial ruling that the municipality has violated the Takings Clause by either denying a development permit or conditioning its approval "is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Agins*, 447 U.S. at 260; *accord Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988); *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

[17] This balance reflects the fundamental insight "that property ownership is inevitably social and that the social context within which property exists is itself a source of responsibilities, as well as rights, of ownership." Gregory Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 Const. Commentary 259, 269 (1992).

The City struck an appropriate balance and did not single Petitioner out because the undisputed findings in the record show that Petitioner's major retail development will have significant flooding and traffic impacts. Those impacts would have allowed the City to deny the application without violating the Takings Clause. Instead of denying the application, however, the City imposed a condition on its approval of the development. That condition addresses the impacts that a denial of Petitioner's application for a major commercial development would have prevented. Indeed, the record shows without dispute a direct cause and effect relationship between the condition and the impacts of the commercial development. Moreover, the City reasonably tailored the condition in both character and degree to the circumstances of this case. Accordingly, this Court should affirm the judgment of the Oregon Supreme Court.

A. This Court's Ruling in *Nollan v. California Coastal Commission* Does Not Support Petitioner's Radical Reading of the Takings Clause

The City agrees that *Nollan v. California Coastal Commission* is the starting point for evaluating the City's condition under the Takings Clause. But Petitioner's takings claim fundamentally misapprehends the Court's ruling in *Nollan*. In particular, Petitioner is under the mistaken impression that *Nollan* marked a dramatic shift in this Court's takings jurisprudence in two ways. First, Petitioner implies that this Court eliminated the presumption of constitutionality that the Court has long applied to legislative decisions. Second, Petitioner believes that to sustain a police power regulation meant to redress the public burdens of a proposed land development, the government must prove the precise extent of those burdens and that it has precisely calibrated its response to those burdens. *Nollan*, however, supports neither of these revolutionary propositions.

1. *Nollan* Did Not Reverse the Normal Presumption of Constitutionality That Attaches to the City's Action

It is well settled that where, as in this case, a private party claims that a state law is unconstitutional, "the existence of facts supporting the legislative judgment is to be presumed." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).[18] Land use regulation is certainly no exception. So long as the validity of the regulation is "fairly debatable, the legislative judgment must be allowed to control." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ("the usual presumption of constitutionality"); *see also Berman v. Parker*, 348 U.S. 26, 32 (1954) (legislative judgment "well-nigh conclusive"). Moreover, the presumption "attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies." *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935), *cited with approval in St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 83 (1936) (Brandeis, J., concurring); *see also* 1 Norman Williams, Jr., American Planning Law § 5B.05 (1988 rev. supp 1993) (administrative acts entitled to presumption of validity); *cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) (Court hesitated to disagree with common sense judgments of local government where nothing in the record suggested those judgments were unreasonable). Hence, the Court has, in a variety of constitutional contexts repeatedly made clear that the burden of proof -- to rebut the validity of

[18] The presumption of validity of legislative enactments is deeply rooted in this Court's jurisprudence. Chief Justice Marshall identified the fundamental canon "that the presumption is in favour [sic] of every legislative act, and that the whole burthen [sic] of proof lies on him who denies its constitutionality." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 436 (1827).

legislative findings and the constitutionality of the legislature's judgment -- rests on those challenging the government's action. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (This Court held that the applicants had failed to "satisf[y] their burden of showing that the Subsidence Act constitutes a taking."); *see also, e.g., Northwest Airlines, Inc. v. County of Kent*, 62 U.S.L.W. 4103, 4108 n.18 (1994); *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981) ("But States are not required to convince the courts of the correctness of their legislative judgments.").[19]

Even more fundamentally, not only does *Nollan* lack any suggestion of an intent to refute this longstanding canon of judicial review, but this Court has since *Nollan* repeatedly disclaimed any contrary intent. In *United States v. Sperry Corp.*, 110 S. Ct. 387 (1989), the Court rejected a takings claim where the Federal Government, like the City in this case, claimed that an exaction -- a user fee -- was necessary to redress burdens imposed on the public.[20] In rejecting the contention that this exaction did not bear sufficient relation to the burdens imposed by the party's action, the Court stressed that "the burden must lie with [the challenging party] to demonstrate that the reality of [the government exactions]

[19] In *Carolene Products Co.*, 304 U.S. at 152 n.4, the Court limited heightened judicial scrutiny to review of regulations affecting either fundamental constitutional rights or discrete and insular minorities in a way that circumvents their political power. That opinion, along with cases such as *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), and *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), make clear the applicability of the presumption of constitutionality to economic regulations.

[20] The user fee at issue in *Sperry* was a uniform percentage charge imposed on successful American claimants before the Iran-United States Claims Tribunal. *See* 110 S.Ct. at 392.

belies [their] express language [stating that they are meant to reimburse the government for its costs] before we conclude that the [exactions] are actually takings. That burden has not been met." *Id.* at 394 (citation omitted).

Recently, in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), the Court stressed that it was not "foisting on the State 'the burden of showing [its] regulation is not a taking.'" *Id.* at 2893 n.6 (brackets in original) (majority opinion quoting Blackmun, J., dissenting at 2909). The Court flatly stated that reading any such intent into the Court's decision would be "wrong." *Id.* In *Lucas*, the Court stressed, the plaintiff had affirmatively established that the regulation had "denied him economically beneficial use of his land." *Id.*

Petitioner here has made no such showing. Petitioner has not challenged the validity of the City's studies, planning or factual findings showing the nexus under *Nollan* (*see* pages 35-37, *infra*); she has not demonstrated that the challenged condition fails to substantially advance legitimate state interests or deprives her of economically viable use of her property; and she has not shown that the City's condition does not address the same legitimate state concerns addressed by the police power restriction that the condition effectively lifts. No doubt that is why Petitioner seeks instead to reverse the normal burdens of proof and presumptions of constitutionality. *Nollan*, however, provides no support for this Court's doing so.

2. *Nollan* Does Not Demand a Strict Proportionality of Exactions and Impacts

Nollan likewise provides no support for Petitioner's related claim that the City must quantify and prove a perfect symmetry between the impacts and the condition. The Court

in *Nollan* took care to avoid selecting a standard for deciding the required "fit" between the exaction and the development's impact. The Court instead applied a "reasonably related" test and left open what level of scrutiny might be warranted. *See Nollan*, 483 U.S. at 838.

Petitioner nonetheless faults the Oregon Supreme Court's characterization of the test for determining the required relationship between an exaction and the development's impacts. That court required a "reasonable relationship." Pet. Cert. A13. Petitioner further faults the Oregon Supreme Court for failing to require perfect symmetry between the City's condition and the impacts of Petitioner's proposed development of her commercial property.[21]

The purpose of the nexus analysis announced in *Nollan*, however, belies any assertion that it was intended to trigger the type of strict scrutiny applied to government restrictions of fundamental rights, like free speech, or to government

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[21] Petitioner's own argument only serves to undermine her criticism of the Oregon Supreme Court and to underscore the futility of her belief that wording the takings test slightly differently offers a judicial panacea to the takings puzzle. Petitioner cannot settle on any consistent formula for the takings inquiry, but posits several contradictory formulations. Those formulations include the following: "'essential nexus'" (Pet. Br. 12); "wholly out of proportion" (*id.*); "no demonstrated relationship" (*id.* at 19); "reasonably direct and proportional relationship" (*id.*); "'close fit'" (*id.* at 20); "close, specific and direct link" (*id.* at 21); "proportionate cause-and-effect relationship" (*id.* at 22); and "substantial nexus" (*id.* at 23). The *amici* supporting Petitioner employ still other verbal formulations, at least some of which are apparently intended to impose differing degrees of scrutiny. As the Oregon Court of Appeals noted, Petitioner has never explained how the semantic difference between her test(s) and the reasonable relationship test necessarily makes a difference. Pet. Cert. C7.

classifications based on suspect classifications.[22] *Nollan* is devoid of any suggestion that the Court adopted Petitioner's far more radical view of the Takings Clause. Indeed, quite the opposite is true. The Court in *Nollan* reasoned that some means-ends fit was necessary to negate the possibility of the government's using its police power authority as a mere subterfuge for obtaining exactions that would otherwise constitute a taking. 483 U.S. at 841. The *Nollan* opinion stressed that its views were consistent with every other court to consider the issue except those of California. 483 U.S. at 839. Because many of those judicial opinions favorably cited in *Nollan* use the same "reasonable relationship" test that the Oregon Supreme Court applied in this case,[23] *Nollan* can hardly be read as condemning that analytical framework. *Nollan* is instead better understood as simply underscoring that Takings Clause concerns require a meaningful and careful application of the reasonable relationship test and not mere judicial lipservice. In this way, the reasonable relationship test fulfills the goals of preventing unfair singling out and governmental subterfuge. *Id.* at 840-41.

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[22] This Court has reserved strict judicial scrutiny for circumstances, unlike this case, where the challenged government regulation -- either by classification or by effect -- impinges on a fundamental constitutional right or is drawn upon inherently suspect distinctions such as race, religion, or alienage. *See, e.g., San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973); *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[23] *See Parks v. Watson*, 716 F.2d 646 (CA9 1983); *Mackall v. White*, 85 A.D.2d 696, 445 N.Y.S.2d 486 (1981); *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981); *Lampton v. Pinaire*, 610 S.W.2d 915 (Ky. Ct. App. 1980); *Call v. City of West Jordan*, 614 P.2d 1257 (Utah 1980); *Noland v. St. Louis County*, 478 S.W.2d 363 (Mo. 1972); *Schwing v. City of Baton Rouge*, 249 So.2d 304 (La. Ct. App.), *application denied*, 259 La. 770, 252 So.2d 667 (1971); *Jenad, Inc., v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673 (1966).

This Court's decisions both before and after *Nollan* support the state court's wording of the test, as well as the impropriety of the Petitioner's exacting "means-ends" test.[24] Contrary to Petitioner's contention, the Takings Clause does not require the City to demonstrate a mathematically equivalent relationship between the exaction and the impacts. "That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it." *Keystone*, 480 U.S. at 487 n.16. "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the

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[24] The source for Petitioner's argument against the "reasonable relationship" test is the requirement that the condition "substantially advance" legitimate state interests. She reads this statement as necessarily requiring a strict review of the relationship between the exaction and the development's impacts. However, the cases leading to Petitioner's argument fall far short of supporting her conclusion. The "substantial advancing" requirement finds its origins in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). *Agins*, 447 U.S. at 260. In *Penn Central*, this Court explained that the substantial advancing test in *Nectow* required only an inquiry into the *reasonableness* of the connection between the challenged regulation and the state purpose it is meant to advance: "When a property owner challenges the application of a zoning ordinance to his property, the judicial inquiry focuses upon whether the challenged restriction *can reasonably* be deemed to promote the objectives of the community land-use plan, and will include consideration of the treatment of similar parcels." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 133 n.29 (1978) (citing *Nectow*, 277 U.S. 183) (emphasis added). Other decisions of this Court have adopted similar interpretations. *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("[C]ourts generally . . . have sustained the [zoning] regulation if it is *rationally related* to legitimate state concerns and does not deprive the owner of economically viable use of his property." (citing *Agins*, 447 U.S. at 260) (emphasis added)); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977) (stating a land use applicant's right to be free from "arbitrary or irrational zoning actions" (citing, *inter alia*, *Nectow*, 277 U.S. 183)).

basic principles of our Government . . ." *Sproles v. Binford*, 286 U.S. 374, 388 (1932); *see Sperry*, 110 S. Ct. at 394 (Takings Clause does not require that government user fee be "precisely calibrated" to the burdens imposed on the government). For these reasons, this Court has long stressed that "[t]he inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. . . . [I]n some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." *Euclid*, 272 U.S. at 388-89; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (refusing to adopt "an unnecessarily rigid burden of proof"). Two years after *Nollan*, moreover, the Court made clear that "the Just Compensation Clause 'has never been read to require the . . . courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received' in determining whether a 'taking' has occurred." *Sperry*, 110 S.Ct. at 394 n.7 (quoting *Keystone*, 480 U.S. at 491 n.21).

Petitioner apparently wants the Court to return to those *Lochnerian* days of heightened judicial review of economic regulation, but now under the guise of takings analysis rather than through that already-discredited substantive due process analysis. Petitioner, however, can find no support for such an unduly activist judicial approach to takings analysis in this Court's precedent during the past fifty years. This Court's decision in *Nollan* is no exception, which is why the Court just last Term unanimously maintained that where a due process challenge to regulatory action fails, "'it would be surprising indeed to discover' the challenged [action] nonetheless violating the Takings Clause." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2289

(1993), (quoting *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986)).

B. This Court's Decision in *Nollan* Supports Rejection of Petitioner's Takings Claim

In *Nollan*, this Court identified three criteria to be used in determining whether a condition of development violates the Takings Clause. First, whether legitimate state interests exist that would allow the government constitutionally to forbid the development without paying compensation. *Nollan*, 483 U.S. at 836. Second, whether the proposed condition substantially advances the same legitimate interests that a denial would have served. *Id.* at 837. Finally, whether the condition is reasonably related in character and degree to the impacts of Petitioner's proposed development. *Id.* at 838. The City's condition easily satisfies all three criteria.[25]

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[25] As discussed above (pages 26-31, *supra*), the City believes that the Oregon Supreme Court's formulation of this last aspect of the takings inquiry -- as requiring a "reasonable relationship" -- accurately reflects the Takings Clause design to ensure that the police power restriction being lifted by the condition is not a mere subterfuge for obtaining the easement exaction. But, as also described below (pages 35-37, 38-49, *infra*), the City believes that the relationship here is substantial enough to pass muster even under a more heightened standard of scrutiny. Ultimately, of course, the significance of any test depends less on its precise wording than on how courts apply it in practice. For instance, the "reasonable relationship" test is often contrasted with a test that, based on its wording -- "specifically and uniquely attributable" -- seems to demand a closer relationship between the exaction and the development impacts that it seeks to redress. There are times, however, when the judicial analysis does not match the superficial strictness of the particular test chosen. In *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966), for example, the court combined the two approaches by ruling that an exaction can satisfy the "specifically and uniquely attributable" requirement by possessing a "reasonable connection"

1. The City Could Have Forbidden the Development Without Paying Compensation

A land use regulation forbidding certain uses does not result in a taking unless it fails to "substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260 (citations omitted); *accord Lucas*, 112 S. Ct. at 2894; *Nollan*, 483 U.S. at 834. Here, prohibition of Petitioner's development, at least until adequate public facilities were in place, would have substantially advanced at least two legitimate state interests: the prevention of flooding and mitigation of traffic congestion. A prohibition of Petitioner's expansion plans would not have denied Petitioner economically viable use of her property.

The legitimacy of the interests on which the City relies cannot be seriously disputed; nor can it be denied that the City's refusal to allow the development would have "substantially advanced" those interests. Although the Court has not elaborated standards for deciding what constitutes a "legitimate state interest" or what is required to show that the government action substantially advances those interests, the Court has "made clear . . . that a broad range of governmental purposes and regulations satisfies these requirements." *Nollan*, 483 U.S. at 834-35; *accord Agins*, 447 U.S. at 262 (accepting "careful and orderly development of residential property with provisions for open-space areas" as a legitimate state interest). Of particular pertinence here, the Court has strongly endorsed the longstanding legitimacy of police power measures restricting development based on "the ill effects of urbanization," including "air, noise and

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to development impacts. 28 Wis. 2d at 618, 137 N.W.2d at 448. The City is confident that its actions meet the basic test of a reasonable relationship, however that test is precisely worded.

water pollution, traffic congestion . . . hazards to geology, fire and flood, and other demonstrated consequences of urban sprawl." *Agins*, 447 U.S. at 261 & n.8 (citation omitted).

No doubt for this reason, Petitioner freely admits that the City's interests in preventing flooding and reducing traffic congestion are valid, indeed "laudable." J.A. 26. Because the record shows that Petitioner's proposed store would increase flood problems and traffic congestion (see pages 6-7, 13-15, 17-18, *supra*), the City could have prevented these problems simply by denying Petitioner's application. The cause of the problems then would never have come into existence. Accordingly, by denying the application, the City would have substantially advanced legitimate state interests.[26]

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[26] Petitioner attempts to obfuscate the constitutional analysis by suggesting that the Tigard Development Code did not have a section allowing the City to deny her application. Petitioner's contention is incorrect and ultimately irrelevant.

Petitioner is incorrect in her assertion that she met all of the approval requirements. The Tigard Development Code required Petitioner to show the development's impacts on the drainage and traffic systems and to address those impacts. She failed to meet her burden. *See* note 6, *supra* and accompanying text. The City could have denied the application on that ground alone. CDC § 18.32.250.

In any event, a conditional permit approval is, by its very nature, a formal government statement that the permit is denied absent compliance with the condition. Certainly nothing in the Takings Clause intimates that government must choose between granting and denying a permit. It would be strange indeed to construe the Takings Clause to prevent government from conditioning a permit where, as in this case, the Clause does not otherwise forbid the government's outright denial of the permit. *Cf. New Orleans*, 427 U.S. at 305 ("[W]e are guided by the familiar principles that a statute is not invalid under the Constitution because it might have gone farther than it did . . . ." (internal quotations and citations omitted)).

Forbidding the development would also not have denied Petitioner economically viable use of her property. A store is operating on the property, and, following a denial, Petitioner could still have operated that store. Hence, Petitioner "may continue to use the property precisely as it has been used . . . . So the law does not interfere with what must be regarded as [Petitioner's] primary expectation concerning the use of the parcel." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978). Petitioner has accordingly never claimed that, had the City refused approval, the City would have denied her economically viable use of the land.

2. The Condition Substantially Advances the Same Legitimate State Interests That a Prohibition Would Have Served

The record in this case, including the City's comprehensive planning documents and specific factual findings, further establishes that the condition will mitigate the drainage and traffic impacts of Petitioner's proposed expansion of her existing retail store in the City's central business district. These are precisely the same legitimate state interests that would have warranted the City's prohibiting the project.

Although Petitioner (understandably) seeks to obscure the point, her challenge is actually quite narrow. As was observed by both Oregon appellate courts, Petitioner has *never* disputed the factual correctness of the findings and the evidence supporting the condition. She has not and cannot, for example, claim that substantial evidence does not support the findings. Having failed to dispute their validity in the courts below, which uniformly upheld those findings, it is

simply too late for Petitioner to dispute those findings before this Court. *See Lucas*, 112 S. Ct. at 2896 n.9.[27]

Putting aside Petitioner's rhetoric, the findings establish that Petitioner's new store will significantly affect the City's storm drainage and traffic systems. Because she did not challenge the basis for the findings, Petitioner concedes that the development's increased impervious surface is "expected to increase the amount of storm water runoff from the site to Fanno Creek." Pet. Cert. G37. Similarly, the uncontested findings establish that the major expansion will increase traffic congestion on the City's already jammed streets. Pet. Cert. G24. Thus, Petitioner's bald assertion that her development "will not impair or destroy in any way any manner of use by the general public of Fanno Creek or the city's Main Street on which the property fronts" (Pet. Br. 17) is misleading at best and cannot be raised at this late date.

a. The Condition Relates to the Interests Served by Denial

The City's condition addresses the same impacts that a denial would also have addressed. Petitioner devotes most of her energy to an argument that the findings did not show that the condition will address the uncontested impacts. She

[27] ORS Chapter 197 establishes the framework for review of local land use decisions in Oregon. A local government's factual findings are presumed to be true if supported by substantial evidence in the record, even if a reviewing court would draw a different conclusion from the same evidence. *See, e.g., Younger v. City of Portland*, 305 Or. 346, 360, 752 P.2d 262, 270 (1988). The City's factual determination of public service needs generated by a proposed development are binding if supported by substantial evidence in the whole record. ORS § 197.830(13)(b). When there are disputed allegations of constitutionality, LUBA on request can take evidence and make findings of fact, *id.*, but Petitioner did not request such a hearing.

incorrectly claims that the findings are based on assumption and supposition. However, the administrative record shows otherwise.

When the City's findings are viewed in their historical context, especially in light of the years of planning documents and studies upon which the City's applicable ordinances are based, the reasonableness of the City's projections of the impacts of Petitioner's development plan cannot be seriously disputed. The City's Drainage Plan and studies evidence a reduction in flood impacts if flood plains are dedicated and improved as called for in the Tigard Development Code. *See* pages 6-10, *supra*. The City's Transportation Plan also demonstrated both how and why the City needed to address congestion problems in the City's downtown and justifiably expected that the bicycle/pedestrian pathway would reduce congestion. App A7, *see also* Arthur C. Nelson, *Public Provision of Pedestrian and Bicycle Access Ways: Public Policy Rationale and the Nature of Private Benefits*, 11 (Center for Planning Development, Georgia Institute of Technology, Working Paper Series, 1994). ("Pedestrians and bicyclists occupying dedicated spaces for walking and/or bicycling . . . remove[s] potential vehicles from streets, resulting in an overall improvement in total transportation system flow.").[28]

Hence, there is absolutely no merit to Petitioner's repeated suggestion that the City simply assumed the existence of entirely speculative and hypothetical impacts of Petitioner's proposed development and exactions. The City acted on uncontested evidence showing a cause and effect

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[28] The effectiveness of bicycle and pedestrian pathway systems in reducing automobile trips and vehicle miles travelled has been proven empirically. *See Amicus* Br. Rails-to-Trails Conservancy & League of American Wheel Men.

relationship between Petitioner's planned development and its likely impacts in fashioning the condition.

b. The Mere Fact that the Condition Will Incidentally Serve Other Legitimate Purposes Does Not Render it Impermissible

Likewise lacking in merit is Petitioner's contention that the City's condition violates the Takings Clause because it incidentally furthers interests other than mitigating flooding and traffic congestion (such as parks and greenspaces). Nothing in the Takings Clause, however, forbids the government from serving many legitimate public interests where, as in this case, the condition is otherwise constitutional. *See Stephenson v. Binford*, 287 U.S. 251, 276 (1932) (citing *Ellis v. United States*, 206 U.S. 246, 256 (1907)); *see also United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). Thus, although the dedication will benefit the public in several ways, its constitutionality turns on whether the dedication would have been justified based solely on the government's mitigating the adverse flooding and traffic congestion problems that Petitioner's major development would create.

As already described (pages 6-12, and 35-37, *supra*), the City's condition in this case is amply justified by the City's need to address flood hazards and traffic congestion. That the City has also sought to allow the public to have access for recreational purposes renders the condition no more infirm than would be a routine sidewalk dedication. The primary purpose of a sidewalk dedication is public transportation. That sidewalks are also a major source of

recreational opportunities plainly does not render invalid an otherwise proper dedication of an easement for the purposes of sidewalk construction.

The record in this case also provides no support for Petitioner's repeated suggestion that the City is using its interests in preventing flooding and traffic congestion as a sham. Contrary to Petitioner's intimations, the City's findings make clear that the exaction requirement primarily addresses flooding problems in Fanno Creek. Pet. Cert. G38. Under the City's plans, the greenspace and park benefits linked to the dedication are secondary to the flood control purposes motivating the condition.[29] The easement dedication is necessary to address flooding concerns in the first instance. It is only upon the creation of such an easement dedicated to flood control that the City's park plans allows for joint recreational use, subordinating that use to flood control concerns. *See* page 9, *supra*.

3. The City's Condition is Reasonably Related in Both Character and Degree to the Anticipated Impacts of the Proposed Development of Petitioner's Downtown Commercial Property

Petitioner claims that the City's condition violates the Takings Clause because it is "wholly out of proportion" to the new store's impacts. Pet. Br. 12. But more than Petitioner's own *ipse dixit* is required to support such a claim. Indeed, because Petitioner chose not to offer any evidence when given opportunities to do so before the City, Petitioner is especially hard pressed to sustain her claim now.

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[29] The channel improvement design criteria in the Drainage Plan call for the incorporation of park and greenbelt areas into channel and drainage works. "Aesthetics and/or recreational benefits should be secondary to the drainage function." R-Doc. F 5-17 to 21.

In all events, as described below, the record in this case makes plain that the City did not unfairly single out Petitioner for disparate treatment. Nor has the City asserted its legitimate interests in flood control and prevention of traffic congestion as a subterfuge for unfairly taking Petitioner's property without compensation. Instead, the City has imposed a condition reasonably related in character and degree to the burdens and benefits resulting from Petitioner's proposed major modification of her commercial property.

Petitioner's contrary view appears to rest on the following syllogism: (1) This Court in *Nollan* held that an easement condition amounted to an unconstitutional taking; (2) The City in this case is imposing an easement condition on Petitioner; therefore (3) The City in this case, like the state in *Nollan,* must be deemed to have unconstitutionally taken the land owner's property. Petitioner's logic is, however, multiply flawed, as is her takings claim.

The only similarity between this case and *Nollan* is that the government regulator in both cases approved permit applications based on the condition of an easement dedication. Because this Court in *Nollan* found that an easement condition can serve as a permissible basis for lifting an otherwise applicable police power requirement, Petitioner's reliance on *Nollan* is entirely misguided. *Nollan* stands for the proposition that, notwithstanding the physically intrusive character of an easement condition, such permit exactions do not necessarily offend the Takings Clause.[30]

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[30] Petitioner appears in her merits brief to have abandoned the contention made in her petition that the condition effected a *per se* taking, and rightly so. To be sure, government action resulting in uninvited physical occupation of property may constitute a taking *per se* in some circumstances. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982). But not where, as in this case, the land owner is seeking the government's permission to take an action that

Hence, although the Court in *Nollan* held that the Takings Clause thereby forbade exaction of an easement -- the granting of lateral access along the beach -- when such a condition did not address the purported reason for the permit -- a loss of visual access from the road -- the Court simultaneously stressed that an easement directly addressing losses of visual access would not be similarly infirm. To that explicit end, the Court posited that the state in *Nollan* could have permissibly required an easement creating a "viewing spot" on the landowner's property, without triggering takings concerns. 483 U.S. at 836.

The City's justification for its easement dedication in this case is even stronger than *Nollan's* hypothetical "viewing spot." First, the relationship between the purposes of the police power restrictions being lifted and the condition is at least as direct, if not more so. The police power restrictions being lifted are directed at flood prevention and traffic congestion concerns. These are the exact same concerns that the easement condition addresses. The drainage easement will reduce the flood hazards caused by storm drainage. *See* pages 6-10, *supra*. The bicycle/pedestrian pathway will reduce traffic congestion. *See* pages 10-12, *supra*; *see also Pennell*, 485 U.S. at 20 (Scalia, J., concurring in part and dissenting in part) ("[T]he common zoning regulations requiring subdividers . . . to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.").

The City's condition is likewise more reasonably related in both character and degree to the anticipated impacts of

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will affect the City's substantial interests. *See Yee v. City of Escondido*, 112 S. Ct. 1522, 1528 (1992); *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 251-52 (1987).

Petitioner's development than was *Nollan's* hypothetical viewing spot to visual access concerns. An easement is precisely the kind of condition necessary to address directly the type of storm drainage and traffic congestion problems to which Petitioner's development will contribute.

The City's easements are also far less intrusive in character than the exaction in *Nollan*. Most fundamentally, unlike *Nollan*, this case involves commercial, not residential, property. It therefore does not implicate this Court's traditional concern with government actions affecting residential property. *See, e.g., United States v. Orito*, 413 U.S. 139, 142 (1973) ("The Constitution extends special safeguards to the privacy of the home."). Public access can be an anathema to private residential property, which often finds its value -- both market and personal -- in its isolation from the public.

By sharp contrast, the same cannot be said about Petitioner's downtown commercial property. Petitioner hopes to build a bigger store to *attract* members of the public. The required easements are completely consistent with, and, indeed, advance that purpose. They reduce the hazards of flooding and enhance the general accessibility to the public of Petitioner's retail store. The easement will aid in the connection of the store to potential customers in the civic and employment center along Hall Boulevard. The easements thereby likely provide substantial value to Petitioner's property, rather than detract from it. But, in any event, "[t]here is nothing to suggest that preventing [Petitioner] from prohibiting [the easements] will unreasonably impair the value or use of [her] property as a [retail store]." *PruneYard Shopping Center,* 447 U.S. at 83.

The condition imposed here, unlike that in *Nollan*, also creates true "reciprocity of advantage." *Pennsylvania Coal*

Co. v. Mahon, 260 U.S. 393, 415 (1922). The City's Drainage Plan demonstrated that floodway improvements will disproportionately benefit those like Petitioner who own property next to the floodplain. *See* page 8, *supra*. Petitioner's finished floor elevation of 152.5 feet places it within the 2-5 foot range by which the 100-year flood elevation is projected to rise in that reach of Fanno Creek without the drainage improvements called for in the Plan. Thus, without the improvements called for in the Plan, the projected 100-year flood elevation will exceed the floor elevation of Petitioner's store.

Petitioner likewise receives considerable benefits from the pathway. Contrary to Petitioner's claim, the City is not requiring her to dedicate a fee simple for the construction of the pathway. *See* notes 14 & 16, *supra*. The City will build, at public expense, the path through the easement called for in the condition. *Id.* Thus, Petitioner will obtain significant advantages from the path built at public expense. The path provides a direct pedestrian connection to Petitioner's store from the downtown's employment center. The path also will reduce traffic congestion, improving street access to her store for potential customers. *See* Nelson, *supra*, at 11. In addition, because Petitioner's greatly-expanded retail store can be used in the future for virtually any retail business -- especially after the second phase of the development -- the value added by the pathway is not restricted to that added to a plumbing store,[31] but is likely to

[31] Petitioner sets forth a red herring when she implies that people only buy bath tubs at plumbing/hardware stores. A bolt is at least as important a hardware item as a bath tub, and can easily be carried on a bicycle. So while a plumbing/hardware store may not generate as many bike trips as a video store, it is easy to see that the path will have utilitarian value to Petitioner's customers. *See* Nelson, *supra*, at 22 ("Even when an argument can be made that a particular tenant has no use for bicycle traffic this relationship is reasonable since tenants come and go but commercial

increase in the future when, as the City's planning studies predict, *see* App A38, residents increasingly rely on bicycles and walking for utilitarian trips.

Finally, the condition benefits Petitioner in another substantial way. The City is allowing her at her request to use the flood plain dedication as a full credit against the landscaping requirement that it would otherwise impose. The landscaping will be installed and maintained at public expense. Pet. Cert. G44, 45, Condition 4; *see* note 15, *supra*, and accompanying text. This credit allows use of approximately an additional 7,000 square feet of the site's buildable area for building and parking purposes that would otherwise be committed to open space. "[T]hese rights . . . undoubtedly mitigate whatever financial burdens the law has imposed on [Petitioner] and, for that reason, are to be taken into account in considering the impact of regulation." *Penn Central*, 438 U.S. at 137 (citation omitted).

For similar reasons, Petitioner cannot seriously contend that the City's easement condition is somehow unduly burdensome on the theory that it interferes with her "distinct investment-backed expectations." *Penn Central*, 438 U.S. at 127. Just as governmental interests differ based on the location and use of particular parcels, so must the property owner's expectation about how the government is likely to regulate his or her property. Just as the government should expect that a beach front homeowner holds privacy as a critical interest, it should also expect that a downtown store owner seeks increased customer access. Indeed, access, via all modes of transportation, is likely the determining factor in maintaining the viability of a central business district. Any argument by Petitioner, therefore, that she made her property investment based on the expectation that the City

activity *per se* is dependent on all forms of traffic.").

would restrict public access and obstruct drainage would be ludicrous. Her argument here that she did not expect the City to enhance drainage and accessibility is hardly less so.

Furthermore, an examination of the condition "in light of the whole of our legal tradition," *Lucas*, 112 S. Ct. at 2903 (opinion of Kennedy, J., concurring in the judgment), underscores the reasonableness of the City's actions in this case, by revealing its roots in settled ideas about valid land use regulation. Those ideas find early expression in the purposes of the Standard State Zoning Enabling Act: "to lessen congestion in the streets; . . . to promote health and the general welfare; . . . to prevent the overcrowding of land; . . . and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements." Standard State Zoning Enabling Act (U.S. Department of Commerce, 1926), *reprinted in* 5 Robert M. Anderson, American Law of Zoning 3d at § 32.01 (1986).[32]

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[32] Exactions linked to the development of land are also not a new innovation. Subdivision dedications have been required since at least 1895. *See* John C. Vance, *Exaction of Right of Way by Exercise of Police Power*, in 2 Ross D. Netherton, Selected Studies in Highway Law 936-N227 at 936-N232 (1988). Indeed, cities have been requiring landowners to build and maintain sidewalks for over a century. *See* Nelson, *supra*, at 7. Thus, "[e]xactions are now firmly entrenched as a legitimate means of exercising community growth control." Vance, *supra*, at 936-N246; *see generally* R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 Law & Contemp. Probs. 5, 25 (1987). During recent decades the use of exactions upon development of all sorts has become common and, therefore, more expected. *See generally*, Vance, *supra*, at 936-N230 n.5 (noting that "although the significant case law in the field has developed almost exclusively around interpretation of subdivision control regulations, the use of exactions has been extended to such other activities as: rezoning, grant of variance, site plan approval, annexation, grant of building permit, erection of apartment house complex,

The City's condition in this case also finds it roots in settled state nuisance law. In *Amphitheaters, Inc. v. Portland Meadows*, 184 Or. 336, 345, 198 P.2d 847, 851 (1948), the Oregon Supreme Court held that flooding of another's land is among the acts which are "easily recognizable" as constituting a common law nuisance. Indeed, the City may have had an affirmative duty to prevent flooding. *See Levene v. City of Salem*, 191 Or. 182, 229 P.2d 255 (1951) (upholding municipality's liability under private nuisance theory for flooding caused by the overburdening of a drainage system). Petitioner had more than ample reason, therefore, to expect the City to take actions necessary to mitigate the increased flood effects her greatly expanded project would cause. Thus, far from frustrating Petitioner's "distinct investment-backed expectations," the City's actions in this case evidence regulation of land that has long been and still remains a commonly accepted response to intensified uses in central commercial districts.

Finally, contrary to Petitioner's claim, the condition that the City imposed in this case is carefully tailored to Petitioner's circumstances in many significant respects.[33] To

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and conversion to condominiums.") (citations omitted).

[33] In her brief to this Court Petitioner claims for the first time in this litigation that the City's condition is invalid because she is already subject to system development charges and, therefore, the condition amounts to unfair double charging. *See* Pet. Br. n.2. Those development charges, however, have absolutely no bearing on the validity of the City's condition. Most fundamentally, they are not part of the City's decision, but are imposed by different governmental entities and are used to fund governmental programs at the discretion of those entities. Washington County, not the City, imposes the traffic impact tax, and the surface water management charges for water quality are imposed by the Unified Sewage Agency (USA), which is created and operated pursuant to ORS Chapter 451. Those systems development charges are imposed on all development

be sure, the City's easement exaction policy turns in the first instance on a threshold inquiry, in particular, whether the location of the development was sufficiently close to the floodplain and the size of the development sufficiently large to trigger expected impacts of the magnitude to contribute substantially to storm drainage and traffic congestion problems. Based on its prior studies and planning documents, the City of Tigard Development Code established, through requiring a major modification of existing development to undergo site development review, a threshold for determining when a development's impacts were sufficient to justify this type of exaction. Petitioner, in turn, passed that threshold when she proposed a major modification of her commercial property in the central business district next to the floodplain: a classification that she has never challenged.

Contrary to Petitioner's apparent assumption, the Takings Clause does not forbid a municipality from imposing an easement condition based on a threshold analysis rather than on a mathematical quantification of the precise impacts of the proposed development. For reasons similar to those expressed by the Court in rejecting an analogous takings challenge brought against flat uniform fees, *see Sperry*, 110 S. Ct. at 394 (citing *Massachusetts v. United States*, 435 U.S. 444, 463 n.19 (1978)), a municipality does not offend the Takings Clause when it uses a threshold analysis to apply the same easement exaction on a large number of parties based on the expected impacts of their respective major developments. The particular effects of each major development may differ to some degree. But this Court has

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county-wide and fund only projects that the County and USA identify as worthy. In contrast, the exactions challenged in this litigation are imposed by the City, not the County, and are imposed in connection with the development approval to provide for improvements pursuant to City law.

wisely declined to "impose a requirement that the Government 'give weight to every factor affecting'" the appropriate level of an exaction. *Sperry*, 110 S. Ct. at 394 (quoting *Massachusetts v. United States*, 435 U.S. at 468). "There is no [such] exacting requirement under the Just Compensation Clause." *Sperry*, 110 S. Ct. at 394 n.7; see page 30, *supra*.

In this case the City gave Petitioner ample opportunity to avoid or adjust CDC requirements based upon the project's impact. Consistent with the City's planning documents, the City designed its general rule of limited dedications to allocate direct and indirect benefits and costs fairly. Petitioner is here on a variance application that allows for case-by-case adjustments to the general rule and the type of dedication condition imposed on Petitioner reflected the City's effort to balance the benefits and burdens of both Petitioner's development and the City's condition.[34]

The City, moreover, did in fact tailor this condition to Petitioner's circumstances. The City found that no structural

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[34] Condition No. 1 of Petitioner's approval only requires the dedication of an easement. Pet. Cert. G43, G44. Had Petitioner provided evidence of the impacts which she perceives to be generated by her development, the mechanism is available within the CDC to further tailor the extent of the exactions. In the absence of any evidence from Petitioner, the City relied upon its storm drainage master plan and its prior transportation planning, which conclude that expansion of commercial enterprises will increase storm water runoff and congestion. Petitioner's attempt to exempt herself from the dedication requirements fell woefully short. Her entire presentation concerning the five applicable variance standards consists of a rambling one-half page assertion that the City's condition was unconstitutional. App E4. Totally absent in her presentation was any factual analysis of the impact of her development that could have led the City to conclude that the exactions being requested were totally out of proportion to the impacts of the proposed development. Pet. Cert. G22, G23.

improvements were required of this development, though the Drainage Plan calls for such improvements along the frontage of this property with Fanno Creek. Pet. Cert. G13, R-Doc. No. F 7-4, Table 8-2. The City required only the dedication of an easement to provide the public with the access necessary to construct and maintain drainage improvements, all at public expense. Pet. Cert. G40, 41. The City concluded that such an approach would address the development's impacts, while affecting only unbuildable property of little value located in the floodplain. Pet. Cert. G39. The City thereby tailored the condition by balancing the relative benefits and burdens of the proposed commercial development.

The City adopted a similar approach with regard to the bicycle/pedestrian path. The City's comprehensive plan identified congestion in its downtown as a particular problem, and it found that congestion on Main Street, located next to Petitioner's property, was so problematic that it restricted emergency response. App A31. Petitioner does not dispute the evidence in the record that her expansion will make that congestion worse. But, rather than simply denying Petitioner's application on that basis, the City was willing to risk that innovative transportation approaches will mitigate the impact. The path will be an effective "travel demand management" solution that will mitigate the increased congestion caused by Petitioner's store. *See* Amicus Br. Rails-to-Trails Conservancy.

The City tailored the precise nature of the exaction that it sought from Petitioner for the bicycle/pedestrian pathway. CDC § 18.164.110 regulates the extent of path dedication and construction requirements for individual projects. It allows a range of requirements, depending on the particular benefit the development will derive from the path. The condition here requires only the dedication of an easement

for pathway purposes. The City decided not to require Petitioner herself to build a pathway along the easement,[35] but instead to do so at public expense.

In summary, the condition to Petitioner's major development was reasonably related in character and degree to the actual impacts of that development. It thereby struck a fair balance between Petitioner's interests and her responsibilities to the public. Thus, the condition did not offend the purposes of the Takings Clause in that it neither singled Petitioner out nor was it the result of subterfuge.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted.

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February 17, 1994

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[35] Petitioner's claim that the City is requiring her to build the path is incorrect. *See* note 14, *supra*.

APPENDIX A

EXCERPTS FROM THE CITY OF TIGARD'S COMPREHENSIVE PLAN

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[I-192] III. STORM DRAINAGE AND WASTEWATER MANAGEMENT

Tigard's Comprehensive Plan recognizes the importance of drainage management and notes the impact of improper management of drainageways and watercourses (flooding, pollution and loss of recreational areas and natural habitats). Thus, the following objectives and policies are contained in the "Environmental Design and Open Space Plan," adopted in 1977.

The Federal Environmental Protection Agency has established requirements which must be met prior to qualifying for funds to construct wastewater management facilities. One of the requirements is the preparation of an Areawide Plan which addresses wastewater point sources and non-point sources. The Metropolitan Service District has prepared an Areawide Plan called No. "208" Plan which addresses facilities and storm water, sanitary sewage, and measures to reduce "storm water runoff."

The major drainage problem in Tigard is the storm water runoff throughout the area. This problem results from the increase in impervious land surfaces that can alter the quantity and quality of runoff from the land. Much of the deficiencies that currently exist within the Tigard area are due to the lack of adequate storm drainage facilities in many areas and stream bank overflow along the Fanno Creek basin.

[I-193] The primary water quantity problem is overbank flooding that occurs when storm water quantity exceeds channel capacity. Further, pollutants transported by storm water runoff from nonpoint sources are significant contributors to the degradation of water quality in the Tigard area. An upper Fanno Creek study found that during several runoff events, the pollutant concentrations measured in the stream exceeds those found in effluent from secondary sewage treatment plants. Urban nonpoint pollution results primarily from the accumulation and transport of contaminated material on paved surfaces such as streets and parking lots. The automobile is a major contributor to many pollutants to these source areas.

In 1981, CH_2M Hill, Inc., developed a "Master Drainage Plan" for the City. This plan incorporates existing procedures and standards regarding subdivision and storm water detention with the recommended changes to the existing floodplain management program. The study also lists numerous recommendations and solutions that would increase the flow efficiently [sic] of the Fanno Creek floodway. For example it is stated that numerous bridges, i.e., the Tigard Street and North Dakota Street bridges, are currently below flood elevation and these bridges substantially decrease the flow of water along Fanno Creek. It is suggested in the study that raising the bridge deck would alleviate much requirements and costs for development of an effective drainage management system. Although many of these improvements are beyond the City's financial means at this time, the City is in the process of incorporating these items into the capital improvements program.

ORDINANCES:

An ordinance has been adopted by City Council relevant to drainage management and the protection of environmentally sensitive lands.

> Ordinance No. 83-09 – The Sensitive Lands Chapter (18.84) of the City zoning ordinance is the most important legislation regarding drainage management. The purpose of the chapter is as follows:
>
> A. Sensitive lands are lands potentially unsuitable for development because of their location within the 100-year floodplain, within natural drainageway, on steep slopes or on unstable ground;
>
> B. Sensitive land areas are designated as such to protect the public health, safety and welfare of the community through the regulation of these sensitive land areas;
>
> C. The regulations of this chapter are intended to implement the Comprehensive Plan and the Federal Emergency Management Agency's flood insurance program, to help preserve natural sensitive land areas from encroaching uses and to maintain the September 1981 zero-foot rise floodway elevation; and
>
> D. City actions under this chapter will recognize the rights of riparian owners to be free to act on the part of the City, its commissions, representatives and agents, and landowners and occupiers.

[I-194] The existing plans and regulations of the City and Washington County express a need for common understanding of drainage problems

and a uniform approach to their solution, both inside and outside of the city limits. Although, the existing policies and regulations provide an excellent basis for drainage planning, the City needs to supplement them with additional regulatory procedures and standards, particularly in the areas of subdivision regulations and storm water detention.

* * *

[I-221] II. TRANSPORTATION ASSUMPTIONS

In any planning effort, there are underlying assumptions that assist in the formulation of policies and implementing strategies.

In regards to transportation, these assumptions include:

1. Because of the diverse number of vehicle trips per day that are taken by Tigard residents, the automobile will remain the most dominant source of transportation.
2. Many of the primary (collector streets) transportation corridors within the City of Tigard are currently developed below City standards, and thus inadequately service both current and future traffic demands.
3. Within the City of Tigard there are numerous employers with over fifty (50) employees and not all of the employees of these firms reside within the Tigard City limits.
4. People will become increasingly more energy conscious because of continuing high fuel prices. This factor may increase public transit ridership. It is assumed that most of

this transit travel will be from Tigard to Portland's core area and not an increase in inter-Tigard trips.

5. Bicycle and pedestrian pathway systems will result in some reduction of automobile trips within the community. These modes of travel could replace short vehicle trips for shopping purposes.
6. Transportation planning for the City of Tigard must be conducted in cooperation with other local and regional jurisdictions e.g., Washington County and the Metropolitan Service District (MSD).
7. Social and environmental concerns will continue to influence transportation routing and development.
8. Most of the population and employment growth during the planning period (1980-2000) will occur in the suburban areas rather that [sic] the Portland urban core; thus putting more pressures on the suburban transportation systems. It may also have the effect of creating longer trips, i.e., a person lives in Tigard and commutes to work in Portland.

[I-222] Within the remaining sections of this report, each of these assumptions will be addressed, either through the available data or through policies and implementation strategies. It is important to note that transportation planning problems cannot be solved within just the Tigard area. In the Tigard area a safe, convenient and economic transportation plan will only be achieved through a coordinated effort of other state, regional and local agencies. At a minimum

these other agencies include: Washington County, the Metropolitan Service District, the Oregon Department of Transportation, and adjacent cities in the southwest area of the Portland metropolitan area.

* * *

[I-256] VIII. PEDESTRIAN AND BICYCLE WAYS

Although auto and transit are the major modes of transportation, walking is one mode used considerably for short trips. Bicycle transportation is primarily used for recreational trips. Presently, there are approximately 40 miles of sidewalk and/or bike paths in Tigard. Most of these paths or sidewalks are in new subdivisions and in the vicinity of schools.

[I-257] Given the suburban nature of Tigard, recreational aspects of the pedestrian and bikeway will be a predominant concern of Tigard residents. Pedestrian pathways are combined with the discussion of bikeways because of similar needs for legislation, funding and purposes of these recreational oriented pathways.

The recreational benefits of a carefully planned system of bicycle and pedestrian pathways in Tigard are numerous. Areas along Fanno Creek which have been identified as having natural significance have been made more accessible to Tigard residents by the pathway system. Park and recreational areas accessibility has also been improved by providing pathways along streets linking parks, schools and shopping areas.

In 1974, the City Council adopted a Comprehensive Pedestrian/Bicycle Pathway Plan which describes the

major generator of bike/pedestrian usage and the phasing priorities for completion of the plan. The open space/greenway concept has provided excellent opportunities for providing access to many areas of the City.

Several benefits of bicycle and pedestrian pathway usage have long been acknowledged as benefiting the community through:

1. Reduction of air pollution sources;
2. Reduction of non-renewable energy consumption;
3. Reduction of auto related congestion;
4. Reduction of noise; and
5. Physical and social benefits to the individual.

In addition, however, there are numerous identified problems related to pedestrian and bicycle usage.

These problems include:

1. Personal safety, competition with auto traffic;
2. Bicycle security;
3. Time efficiency;
4. Inclement weather, and/pedestrian pathway;
5. Lack of connecting bike/pedestrian pathway facilities between jurisdictions; and
6. Potential crime and policing bikeways.

A. PLANNING RELATED EFFORTS

The Portland area is not lacking for trail and bikeway paths and the connection of pathways between adjacent communities remains a high potential.

Washington County adopted a Bicycle Pedestrian Pathway Master Plan in 1975. The Plan, however, has never been fully implemented. The County is now in the process of updating its 1975 plan. Recognizing the limitations of the present road system to offer safe bicycle use and the extensive growth that has occurred in recent years, the Public Works Department has begun updating the City's pedestrian/bicycle plan to reflect where the best opportunities for bicycle use [I-258] are available. A major obstacle towards developing an extensive bicycle/pedestrian network is lack of public funds for such an effort. Opportunities, however, do exist in the developing areas of the County where unused right-of-way is available or where right-of-way could be acquired in conjunction with new developments or road improvements.

To implement its adopted plan, the City of Tigard has relied on its street overlay and widening program, and adjacent development. These processes have allowed for the completion of an additional 3.7 miles of bike/pedestrian pathways in 1982. It is anticipated that as more of the streets in Tigard come under the City's jurisdiction, additional bike/pedestrian pathway links will be completed.

* * *

[I-266] APPENDIX III

TIGARD AREA
COMPREHENSIVE PEDESTRIAN-BICYCLE
PATHWAY PLAN

Prepared by
Tigard Area Pedestrian-Bicycle
Pathway Committee

Adopted March 25, 1974

[I-267] The following is a short report regarding the subject plan, written so that the public might better understand the thinking and rationale that is embodied within the plan.

Committee History

Briefly, the Washington County Commissioners chose to spend their 1% gasoline tax bicycle-pedestrian pathway money on areas close to schools. In order to determine the location of these proposed rates [sic], the County requested the Tigard School District to make a priority listing of desired pathways on county roads within the district. The school district assigned its Safety and Transportation Coordinator, Bill Bieker, to the project and a list was compiled. As a result of this work the school district and the management of the City of Tigard felt a comprehensive pedestrian-bicycle plan for the Tigard area was needed. Bill Bieker from the school district and Steve Telfer, City Manager, agreed to establish a committee for the purpose of developing a comprehensive pathway plan and members were selected from each elementary school attendance area. Others who have assisted the committee include Nick Hiebert, Tigard Department of

Public Works; Wink Brooks, Tigard Planning Director; and Steve Oppenheim, Director of Bikeway Planning, CRAG; Norm Hartman, a Tigard Planning Commissioner, is *also* a member of our committee.

Criteria for Path Selection

In determining where routes were to be located, the committee chose the following criteria:

1. To reduce hazards that exist on present roads;
2. To provide safe access to schools, recreation areas and major shopping areas;
3. To develop the possibility of walking to school rather than riding, thereby eliminating some school bus transportation;
4. To serve the greatest number of potential users;
5. To provide safety for walkers and bike riders to summer activities which require transportation by auto; *and*
6. [I-268] To establish pedestrian access to mass transportation.

Routes considered were only within the Tigard School District boundaries. The City Planning Staff has recommended additional routes to complete our Plan and create a total bicycle-pedestrian pathway system within the Tigard planning area. We have reviewed and approved the location and phasing of routes proposed by the staff. The City Staff's criteria for route selection were as follows:

1. To reflect proposed regional pedestrian-bicycle routing through the Tigard area;

2. To reflect the Greenway System proposed in the *Tigard Community Plan;*
3. To provide better pedestrian-bicycle access around and through certain neighborhoods;
4. To reflect recommendations embodied in the Ash Avenue-Downtown Neighborhood Plan; *and*
5. To create better access to downtown Tigard from the Greenburg neighborhood.

The described route selection criteria were measured against a relationship to major pedestrian and bicycle traffic generators. These can be grouped into four general categories: schools, recreation points, shopping and public buildings. There [sic] are described as follows:

Schools:

(Elementary)	(Junior High)	(High School)
Durham	Thomas R. Fowler	Tigard Senior High
Metzger	Tuality	
Phil Lewis		
St. Anthony's		
Templeton		
Charles F. Tigard		
Tualatin		

Recreation Points:

- Cook Park
- School tennis courts
- Jack Park
- Metzger Park
- Tigard Swim Center
- Tuality tennis courts
- Tualatin Park
- Woodard Park

Shopping:

- Canterbury Square
- Downtown Tigard
- Downtown Tualatin
- Fred Meyer
- K-Mart
- King City
- Tigard Plaza
- Washington Square

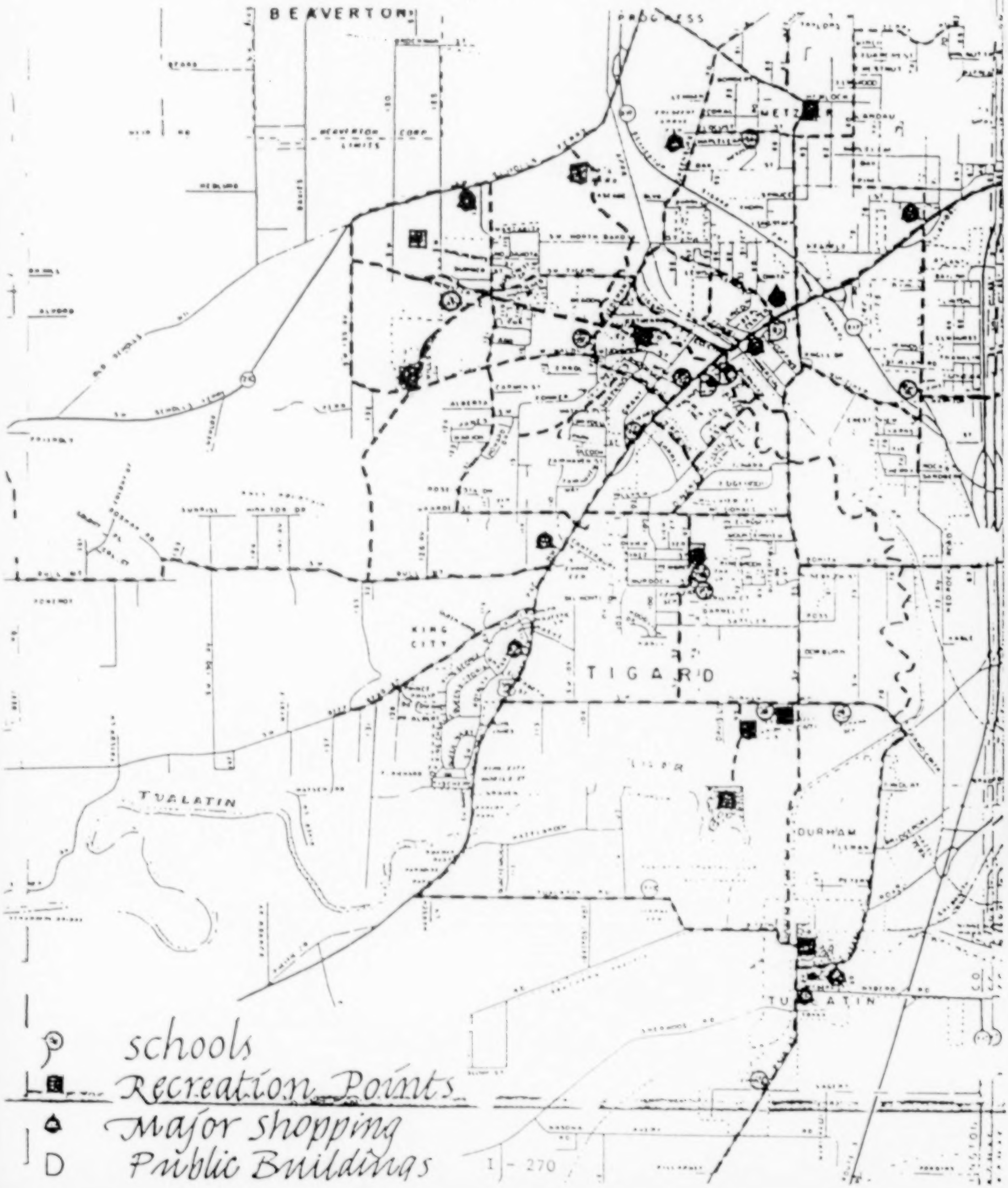
[I-269] Public Buildings:
Library
Old Fowler Jr. High (tentative community center)
Tigard Post Office
Tualatin Post Office

School District 23J school population distribution maps were also utilized in routing the pathways.

Recommended Development Phases

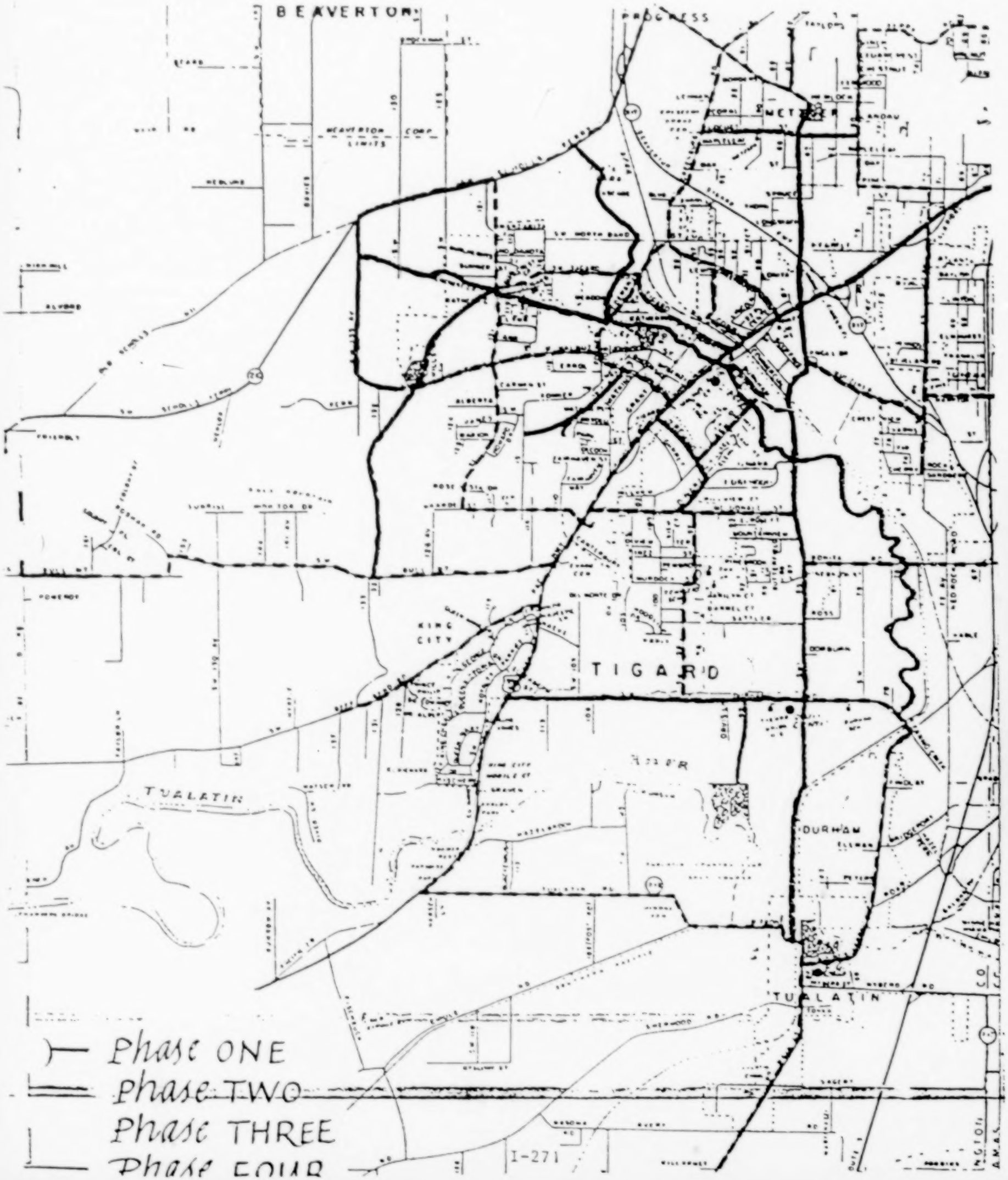
The Committee has prioritized both the Committee's own route selections and the Planning staff's selections on the basis of public safety. It should be noted that the Committee does not feel that the proposed routing will be implemented in the exact order recommended, but rather some routes will be constructed out of phase and in conjunction with street and park projects. The Committee does recommend the described phasing as project priorities for any City initiated pedestrian-bicycle pathway program.

Major Generators



BEST AVAILABLE COPY

Priorities



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* * *

[II-11] 3. NATURAL FEATURES AND OPEN SPACE

This chapter addresses a broad range of topics all having to do with the natural resources located within the Tigard Urban Planning Area. This chapter reflects the concerns expressed in several of the Statewide Planning Goals including:

> Goal #3 – Agricultural Lands; Goal #4 – Forest Land; Goal #5 – Open Spaces; Scenic and Historic Areas and Natural Resources; Goal #7 – Areas subject to Natural Disasters and Hazards; and Goal #8 – Recreational Needs.

The natural environments within the planning area offer many opportunities for a unique and healthy urban development. Those environments, when viewed as a series of systems rather than isolated features, will provide Tigard with those elements necessary for a healthy place in which to live, work and play. Floodplain greenways, for example, can provide the community with an excellent system of open space links between neighborhoods and services, in addition to providing a relatively inexpensive system for storm water runoff. It is to the community's benefit that consideration be given to both the opportunities and the limitations of the various environments within the planning area.

The natural environments included within the planning area all have their own respective limitations with regard to urbanization. Development pressure upon lands with such limitations can have profound effects on the environment. Erosion of steep slopes caused by inappropriate

development, for instance, does not occur as an isolated incident. Soil type, permeability, vegetation and drainage all play major roles in and are effected by development. Likewise, the effects of inappropriate development located within the floodplain areas could have adverse effects on properties both up and down stream from the development site. The social, cultural and economic values of such resource lands could be reduced by the effects of urban development nearby. The limitations of the various environments should be considered in reviewing new development within the planning area.

The recognition of the natural environment in the planning area and the development of findings and policies which address the characteristics of the environment are extremely important elements in the Comprehensive Plan. The purpose of this chapter is to define the parameters of the various natural environments in the planning area and to identify the limitations and opportunities inherent in those environments.

Additional information on this topic is available in the "Comprehensive Plan Report: Natural Features and Open Spaces."

3.1 PHYSICAL LIMITATIONS, NATURAL HAZARDS AND WETLANDS

Findings

- The physical features which form the make-up of any piece of land have a direct relationship to the type and density of development which can be accommodated on that property (carrying capacity). Combinations such as steep slopes and unstable soils create severe development constraints. Excessive development in

such physically limited areas greatly increases the potential severity of landslide, earthquake damage, flooding, etc.

- Many portions of the floodplain area contain natural aspects such as significant vegetation, wildlife, and scenic areas, and are valuable for open space and recreation.

- [II-12]Vegetation serves an essential element [sic] in runoff and erosion control, as well as for the protection and natural habitation of wildlife. Nonetheless, it is too often removed and replaced by buildings or impervious surfaces.

- Due to the general nature of soils and geologic mapping, site specific analysis is often necessary to determine the presence of geologic hazards and the severity of soil problems which are constraints to development. Such geologic hazards exist when certain combinations of slope, soil, [and] bedrock and moisture render land unstable.

- Earthflow and slump areas exist in hilly sections of the planning area and are associated with poor drainage, shallow subsurface flow on [sic] ground water and springs, and high susceptibility to erosion. Earthflow and slump occurrences can destroy roads and buildings, and adversely affect water quality. Mass movement has not resulted in any major loss of life or property thus far, because little in the way of urban development exists on land with serious problems.

- Increased runoff and sedimentation from poorly developed hillsides can require increased public expenditures for flood and erosion control and storm water management.

- The City of Tigard had adopted a "Hillside Development Provision" within the Sensitive Lands ordinance

which requires additional review of those developments.

- The City of Tigard requires new developments to have a storm water runoff plan to ensure against adverse effects such as erosion and sediment.

POLICY

3.1.1 THE CITY SHALL NOT ALLOW DEVELOPMENT IN AREAS HAVING THE FOLLOWING DEVELOPMENT LIMITATIONS EXCEPT WHERE IT CAN BE SHOWN THAT ESTABLISHED AND PROVEN ENGINEERING TECHNIQUES RELATED TO A SPECIFIC SITE PLAN WILL MAKE THE AREA SUITABLE FOR THE PROPOSED DEVELOPMENT. (NOTE: THIS POLICY DOES NOT APPLY TO LANDS DESIGNATED AS SIGNIFICANT WETLANDS ON THE FLOODPLAIN AND WETLANDS MAP.)

a. AREAS MEETING THE DEFINITION OF WETLANDS UNDER CHAPTER 18.26 OF THE COMMUNITY DEVELOPMENT CODE;

b. AREAS HAVING A SEVERE SOIL EROSION POTENTIAL;

c. AREAS SUBJECT TO SLUMPING, EARTH SLIDES OR MOVEMENT;

d. AREAS HAVING SLOPES IN EXCESS OF 25%; OR

e. AREAS HAVING SEVERE WEAK FOUNDATION SOILS.

(Rev. Ord. 85-13; Ord. 84-36)

[II-13] IMPLEMENTATION STRATEGIES

1. Areas having physical limitations (poor drainage, seasonal flooding, unstable ground) may be subject to policy 3.1.1. of the Comprehensive Plan.

2. The City shall revise the Sensitive Lands section of the Tigard Community Development Code to identify the standards and define those areas having distinct constraints and limitations.

3. The City shall cooperate with other agencies to help identify these areas.

4. The City of Tigard shall provide in the Community Development Code a provision for the City to require site specific soil surveys and geologic studies where potential hazards are identified based upon available geologic and soils evidence. When natural hazards are identified, the City will require that special design considerations and construction measures be taken to offset the soil and geologic constraints present in order to protect life and property, and to protect environmentally sensitive areas.

5. The Community Development Code shall not permit developments to be planned or located in known areas of natural disasters and hazards without appropriate safeguards. (Rev. Ord. 85-13)

3.2 FLOODPLAINS

Findings

- The objective of the City is to use the detailed information gathered on floodplains from the U.S. Army Corps of Engineers, and develop policies to:

  1. Control development, as to not adversely affect the floodplain and floodway areas;

2. Minimize the runoff-erosion impact of development on the surrounding area and downstream properties; and

3. Emphasize the retention of a vegetative buffer along streams and drainageways, to reduce runoff and flood damage and provide erosion and siltation control.

- In addition, there is the issue of the cumulative effect of development upstream of Tigard. Flood levels in Tigard will be substantially determined by the controls exercised over development outside the plan area, as well as inside Tigard's Planning Area.

- The Fanno Creek drainage system includes numerous small water courses. The integrity of these natural drainageways is intrinsically connected to the systems [sic] capacity to absorb excessive runoff and on subsequent flood levels. Often, however, water courses are altered to provide more usable land. If alterations are done incorrectly, impacts can be adverse. If the impacts are adverse, they can be detrimental to the entire drainage system, i.e., the storage capacity of the water course is lessened and flooding occurs. In fact, in lower reaches, it is beneficial to have more water move through at a faster rate.

- [II-14] Besides the basic need to control development in flood prone areas, it was found that public knowledge of flood plain hazards was lacking. Many of the obstructions previously placed in the flood plain were the result of a lack of information and adequate runoff predictions about potential flooding problems. These obstructions (e.g., Main Street Bridge) hinder the flow of high water and tend to increase flood levels.

- Proper administration of the floodplain areas relies heavily upon the availability of adequate information upon which to assess the environmental impacts of a

project. The development, which creates the need, should be responsible for providing the City with the necessary data for making sound decisions. The burden is on the applicant to prove that a project will not adversely affect the environment or create undue future liabilities for the City.

- The City of Tigard, with assistance from the U.S. Army Corps of Engineers, has established an area designated within the 100-year floodplain.

- The City of Tigard has been accepted as an eligible area for the National Flood Insurance Program, and as a result flood insurance will be available to property owners in flood prone areas. The federal program, however, requires the City to adopt an ordinance which meets certain federal standards.

- The City of Tigard currently has ordinances, policies and standards within the Tigard Community Development Code which provide adequate controls for development within floodplain areas.

- According to the 1981 Drainage Master Plan Study conducted by CH_2M Hill for the City, flood levels of two to four feet higher than the existing 100-year floodplain may be expected if no corrective measures are taken.

- To protect the intent of the City's Greenway policy, the Greenway is defined with the same physical boundaries as the 100-year floodplain boundary. (Rev. Ord. 85-13)

POLICIES

3.2.1 THE CITY SHALL PROHIBIT ANY LAND FROM [sic] ALTERATIONS OR DEVELOPMENTS IN

THE 100-YEAR FLOODPLAIN WHICH WOULD RESULT IN ANY RISE IN ELEVATION OF THE 100-YEAR FLOODPLAIN.

3.2.2 THE CITY SHALL:

a. PROHIBIT LAND FORM ALTERATIONS AND DEVELOPMENT IN THE FLOODWAY*, EXCEPT ALTERATIONS MAY BE ALLOWED WHICH PRESERVE OR ENHANCE THE FUNCTION AND MAINTENANCE OF THE ZERO-FOOT RISE FLOODWAY*; AND

b. ALLOW LAND FORM ALTERATIONS OR DEVELOPMENT IN THE FLOODPLAIN* OUTSIDE THE ZERO-FOOT RISE FLOODWAY* WHICH PRESERVE OR ENHANCE THE FUNCTION OF THE ZERO-FOOT RISE FLOODWAY* PROVIDED:

1. THE LAND FORM ALTERATION AND/OR DEVELOPMENT IS IN AN AREA DESIGNATED COMMERCIAL OR INDUSTRIAL ON THE COMPREHENSIVE PLAN LAND USE MAP, AND FACTORS SET FORTH IN POLICY 3.2.3 CAN BE SATISFIED; OR

2. [II-15] THE LAND FORM ALTERATION AND/OR DEVELOPMENT IS ASSOCIATED WITH COMMUNITY RECREATION USES, UTILITIES, OR PUBIC SUPPORT FACILITIES AS DEFINED IN CHAPTER 18.42 OF THE COMMUNITY DEVELOPMENT CODE AND THE FACTORS SET FORTH IN POLICY 3.2.3 CAN BE SATISFIED.

3.2.3 WHERE LAND FORM ALTERATIONS AND DEVELOPMENT ARE ALLOWED WITHIN THE

100-YEAR FLOODPLAIN* OUTSIDE THE ZERO-FOOT RISE FLOODWAY*, THE CITY SHALL REQUIRE:

a. THE STREAMFLOW CAPACITY OF THE ZERO-FOOT RISE FLOODWAY* BE MAINTAINED;

b. ENGINEERED DRAWINGS AND/OR DOCUMENTATION SHOWING THAT THERE WILL BE NO DETRIMENTAL UPSTREAM OR DOWNSTREAM EFFECTS IN THE FLOODPLAIN* AREA, AND THAT THE CRITERIA SET FORTH IN THE SENSITIVE LANDS SECTION OF THE CODE HAVE BEEN MET (See FIS September 1981);

c. A BUFFER, EITHER EXISTING OR PLANTED, ON THE COMMERCIAL OR INDUSTRIAL LAND ABUTTING RESIDENTIAL LAND WHICH ADEQUATELY SCREENS THE DEVELOPMENT FROM VIEW BY THE ADJOINING RESIDENTIAL LAND, AND WHICH IS OF SUFFICIENT WIDTH TO BE NOISE ATTENUATING; AND

d. THE DEDICATION OF OPEN LAND AREA FOR GREENWAY ADJOINING THE FLOODPLAIN* INCLUDING PORTIONS AT A SUITABLE ELEVATION FOR THE CONSTRUCTION OF A PEDESTRIAN/BICYCLE PATHWAY WITHIN THE FLOODPLAIN* IN ACCORDANCE WITH THE ADOPTED PEDESTRIAN BICYCLE PATHWAY PLAN.

3.2.4 THE CITY SHALL PROHIBIT DEVELOPMENT WITHIN AREAS DESIGNATED AS SIGNIFICANT WETLANDS ON THE FLOODPLAIN AND WETLANDS MAP. NO DEVELOPMENT SHALL OCCUR ON PROPERTY ADJACENT TO AREAS

DESIGNATED AS SIGNIFICANT WETLANDS ON THE FLOODPLAIN AND WETLANDS MAP WITHIN TWENTY FIVE (25) FEET OF THE DESIGNATED WETLANDS AREA. DEVELOPMENT ON PROPERTY ADJACENT TO SIGNIFICANT WETLANDS SHALL BE ALLOWED UNDER THE PLANNED DEVELOPMENT SECTION OF THE CODE.

3.2.4 THE CITY SHALL REQUIRE THE DEDICATION OF ALL UNDEVELOPED LAND WITHIN THE 100-YEAR FLOODPLAIN PLUS SUFFICIENT OPEN LAND FOR GREENWAY PURPOSES SPECIFICALLY IDENTIFIED FOR RECREATION WITHIN THE PLAN.

• The Floodplain and Floodway, as defined by the Flood Insurance Study for the City of Tigard dated September 1, 1981.

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[II-40] 7. PUBLIC FACILITIES AND SERVICE

The continued increased growth in population for the Tigard Planning area will require a corresponding expansion of public facilities and services. Policies concerning the manner in which public facilities are expanded can help direct the location and intensity of future housing, commercial and industrial development.

Statewide Planning Goal #11 specifically speaks to this concern. It directs jurisdictions

> "to plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban development."

The findings, policies and implementation strategies of this chapter address general issues related to public facilities and services as well as issues concerning water, sewage disposal, police and fire protection, schools, health services and local government facilities to name a few.

Detailed information related to public facilities and services is available in the "Comprehensive Plan Report: Public Facilities and Services," and a variety of facilities master plans and background reports developed by or for the City.

7.1 GENERAL

Findings

- Community goals emphasize the desire to maintain the high quality of facilities and services within the City.
- The community's facilities and services are an important management tool in the conservation and development of land within the urban planning area.
- Plans and programs need to be developed for the expansion of urban services in a logical and orderly manner. This should include a funded and effective capital improvement program.
- Phasing adequate public facilities and services to support residential development is necessary to meet community needs.
- The City of Tigard and related service districts have the duty, within their means, to provide adequate services to meet the demand for all development within the planning area during the planning period.

- Phasing the facilities expansion is necessary for orderly growth.
- Formation of private utility districts (water, sewer) could create land management problems within the Urban Planning Area.
- A capital improvements program would facilitate the coordination and expansion for providing transportation, utilities and other public facilities.

[II-41] POLICIES

7.1.1 THE CITY SHALL:

a. PREPARE AND IMPLEMENT A CAPITAL IMPROVEMENTS PROGRAM IN CONJUNCTION WITH WASHINGTON COUNTY AND THE APPLICABLE SERVICE DISTRICTS;

b. WORK WITH THE SERVICE DISTRICTS TO PROVIDE A COORDINATED SYSTEM FOR PROVIDING SERVICES;

c. PROVIDE URBAN SERVICES IN ACCORDANCE WITH THE COMPREHENSIVE PLAN TO THE EXTENT OF THE CITY'S FINANCIAL RESOURCES;

d. USE THE CAPITAL IMPROVEMENTS PROGRAM AS A MEANS FOR PROVIDING FOR ORDERLY GROWTH AND THE EFFICIENT USE OF LAND;

e. DEVELOP A COMPREHENSIVE PLAN WITH CONSIDERATION BEING GIVEN TO THE LEVEL AND CAPACITY OF THE EXISTING SERVICES; AND

f. ADOPT LOCATIONAL CRITERIA AS THE BASIS FOR MAKING DECISIONS ABOUT THE PROPER LOCATION FOR PUBLIC FACILITIES.

7.1.2 THE CITY SHALL REQUIRE AS A PRE-CONDITION TO DEVELOPMENT APPROVAL THAT:

a. DEVELOPMENT COINCIDE WITH THE AVAILABILITY OF ADEQUATE SERVICE CAPACITY INCLUDING:

1. PUBLIC WATER;
2. PUBLIC SEWER SHALL BE REQUIRED FOR NEW DEVELOPMENT WITHIN THE CITY UNLESS THE PROPERTY INVOLVED IS OVER 300 FEET FROM A SEWER LINE AND WASHINGTON COUNTY HEALTH DEPARTMENT APPROVAL FOR A PRIVATE DISPOSAL SYSTEM IS OBTAINED; AND
3. STORM DRAINAGE.

b. THE FACILITIES ARE:

1. CAPABLE OF ADEQUATELY SERVING ALL INTERVENING PROPERTIES AND THE PROPOSED DEVELOPMENT; AND
2. DESIGNED TO CITY STANDARDS.

c. ALL NEW DEVELOPMENT UTILITIES TO BE PLACED UNDERGROUND.

(Rev. Ord. 86-08)

IMPLEMENTATION STRATEGIES

1. As a part of the ongoing planning program, the City will prepare a capital improvements program; and

a. The staging of facilities will be based on the availability of financial resources;

b. [II-42] Priorities will be based on considerations of:

1) Health and safety factors;

2) Cost-benefit factors; and

3) Social and economic needs.

2. As a part of the Community Development Code, standards will be included in:

a. The Land Division Ordinance for the construction of services; and

b. The Community Development Code which requires future subdivision plans in areas where allowed densities due to a lack of services are less than the plan densities.

3. Where sewer is not available to site, the developer shall be required to extend the services to the site at the developer's cost. The City shall adopt an ordinance providing for partial cost as intervening parcels are developed by the intervening landowners.

4. The Tigard Community Development Code shall establish an ordinance which indicates:

a. That services shall be extended from property line to property line, including services located in adjacent rights-of-way; except

b. That the ordinance shall allow for the phasing of such services if a development proposal indicates such phasing.

The intent of these policies is to develop a mechanism for an orderly and logical development and expansion of services to promote an efficient use of land and thus an

efficient growth pattern. This mechanism will basically be concerned with: Planning for public facilities in advance of need in a manner which will implement land use policy. This shall help direct the urban expansion and growth.

7.2 STORM DRAINAGE AND WASTEWATER MANAGEMENT

Findings

- The major drainage problem in Tigard is the storm-water runoff throughout the area.
- The primary water quantity problem is overbank flooding that occurs when storm-water quantity exceeds channel capacity.
- CH_2M Hill, Inc. developed a "Master Drainage Plan" for the City in 1981, which incorporates existing storm-water detention and subdivision procedures and standards with the recommended changes to the existing floodplain management program.
- There is an emphasis on the retention of a vegetation buffer along streams and drainageways to reduce run-offs and flood damage, and provide for erosion control.
- Most of the following policies have been transformed into City regulations.

[II-43] POLICIES

7.2.1 THE CITY SHALL REQUIRE AS A PRE-CONDITION TO DEVELOPMENT THAT:

a. A SITE DEVELOPMENT STUDY BE SUBMITTED FOR DEVELOPMENT IN AREAS SUBJECT TO POOR DRAINAGE, GROUND

INSTABILITY OR FLOODING WHICH SHOWS THAT THE DEVELOPMENT IS SAFE AND WILL NOT CREATE ADVERSE OFF-SITE IMPACTS: [sic]

b. NATURAL DRAINAGE WAYS BE MAINTAINED UNLESS SUBMITTED STUDIES SHOW THAT ALTERNATIVE DRAINAGE SOLUTIONS CAN SOLVE ON-SITE DRAINAGE PROBLEMS AND WILL ENSURE NO ADVERSE OFF-SITE IMPACTS;

c. ALL DRAINAGE CAN BE HANDLED ON-SITE OR THERE IS AN ALTERNATIVE SOLUTION WHICH WILL NOT INCREASE THE OFF-SITE IMPACT;

d. THE 100-YEAR FLOODPLAIN ELEVATION AS ESTABLISHED BY THE 1981 FLOOD INSURANCE STUDY CONDUCTED BY THE U.S. ARMY CORPS OF ENGINEERS BE PROTECTED; AND

e. EROSION CONTROL TECHNIQUES BE INCLUDED AS A PART OF THE SITE DEVELOPMENT PLAN.

7.2.2 THE CITY SHALL:

a. INCLUDE IN ITS CAPITAL IMPROVEMENTS PROGRAM, PLANS FOR SOLVING DRAINAGE PROBLEMS IN THE EXISTING DEVELOPED AREAS;

b. RECOGNIZE AND ASSUME ITS RESPONSIBILITY FOR OPERATING, PLANNING AND REGULATING WASTEWATER SYSTEMS AS DESIGNATED IN THE MSD WASTEWATER TREATMENT MANAGEMENT "208" PLAN; AND

c. APPLY ALL APPLICABLE FEDERAL AND STATE LAWS AND REGULATIONS WITH RESPECT TO WASTEWATER.

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[II-47] 7.6 FIRE PROTECTION

Findings

- Currently, the City of Tigard is serviced by the Tualatin Rural Fire District and Washington County Fire District #1.
- [II-48] Continued growth and urbanization places additional need for fire related services.
- Congestion on some area streets slows the response time to fires. Among locations where this has been noticed are:

  Vicinity of Greenburg & Tiedeman;
  Pacific Highway;
  Main Street;
  Hall Boulevard between Commercial and Pacific Highway;
  Walnut Street;
  Tiedeman;
  Railroad crossings at Hall Boulevard and Main Street.

During flooding, some bridges may be closed (e.g., at Grant Street and on Hall Boulevard) necessitating the use of time consuming circuitous routes.

- Subdivision plats can create access problems when there are too few through streets. There are numerous examples of dead end streets throughout the City.

POLICY

7.6.1 THE CITY SHALL REQUIRE AS A PRE-CONDITION TO DEVELOPMENT THAT:

a. THE DEVELOPMENT BE SERVED BY A WATER SYSTEM HAVING ADEQUATE WATER PRESSURE FOR FIRE PROTECTION PURPOSES;

b. THE DEVELOPMENT SHALL NOT REDUCE THE WATER PRESSURE IN THE AREA BELOW A LEVEL ADEQUATE FOR FIRE PROTECTION PURPOSES; AND

c. THE APPLICABLE FIRE DISTRICT REVIEW ALL APPLICATIONS.

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[II-54] 8. TRANSPORTATION

This chapter addresses Statewide Planning Goal #12:

> Transportation which requires local jurisdictions "to provide and encourage a safe, convenient and economic transportation system."

Transportation planning has been defined as " . . . the process by which transportation improvements or new facilities are systematically conceived, tested as to present and future adequacy, and programmed for future construction. Modern transportation planning emphasizes the total transportation system. It considers all modes of

transport which are economically feasible to a state, region or urban area." (Goodman & Freund, Principals and Practices of Urban Planning, "Transportation Planning")

The transportation plan for Tigard reaches beyond the Tigard Planning Area and includes traffic and transportation impacts within other areas of the southwest subregion of the Portland Metropolitan Area. The Metropolitan Service District (MSD) acts as the regional coordinator for transportation planning throughout the Portland Metropolitan Area. The other major service district impacting Tigard is Tri-Met which is charged with the responsibility for providing public transportation throughout the metropolitan area.

The Comprehensive Plan proposes a land use plan that encourages and facilitates balanced transportation development for the City. The plan recognizes that land use and transportation investments are interconnected and that relationship should be reinforced to produce an acceptable urban environment.

Detailed information concerning transportation in the Tigard Urban Planning Area is available in the "Comprehensive Plan Report: Transportation."

8.1 TRAFFICWAYS

Findings

- A need exists to place all of the existing public local and collector streets in the Tigard City Limits under the City's jurisdiction.

- According to a Washington County computer [sic] study 48-60% of Tigard residents work outside of the Washington County area.
- Between 77-83% of Tigard residents commute to work by auto as single occupants.
- Major congestion problems within the City have resulted from the rapid population growth since 1970, creating a need for major street improvements.
- A corridor study for Pacific Highway (99W) has not been prepared by MSD. It is the only major trafficway within the region which has not been studied. Pacific Highway, the major trafficway through the City, has the highest traffic volumes, congestion and accident[s] rates within the City. There is a need to prepare a corridor study for Pacific Highway. The City, Metropolitan Service District and [the] State should coordinate such a study.
- [II-55] Many of the streets in Tigard are dead-ended which adds to the congestion on existing completed streets. Therefore, a number of street connections need to be constructed.
- A major concern of the community regarding transportation is the need to maintain and improve the livability of residential areas in the face of increasing population and transportation requirements.
- The City needs to develop a strategy to coordinate public street improvements with private sector improvements to achieve the most effective use of the limited dollars available for road development and improvement.
- Major residential growth during the planning period is expected to occur in the westerly and southerly areas of Tigard. Both of these areas lack adequate improved trafficways.

- A need exists during the planning period to complete a collector street system between Scholls Ferry Road, Walnut Street, Gaarde Street, Bull Mountain Road and Pacific Highway. The location of these connections needs to be coordinated between the City, County, State and [the] Metropolitan Service District.
- A need exists to complete the collector street system within the Tigard Triangle area to make more of this area accessible to developers, employers and employees.

POLICIES

8.1.1 THE CITY SHALL PLAN FOR A SAFE AND EFFICIENT STREET AND ROADWAY SYSTEM THAT MEETS CURRENT NEEDS AND ANTICIPATED FUTURE GROWTH AND DEVELOPMENT.

8.1.2 THE CITY SHALL PROVIDE FOR EFFICIENT MANAGEMENT OF THE TRANSPORTATION PLANNING PROCESS WITHIN THE CITY AND THE METROPOLITAN AREA THROUGH COOPERATION WITH OTHER FEDERAL, STATE, REGIONAL AND LOCAL JURISDICTIONS.

8.1.3 THE CITY SHALL REQUIRE AS A PRECONDITION TO DEVELOPMENT APPROVAL THAT:

a. DEVELOPMENT ABUT A PUBLICLY DEDICATED STREET OR HAVE ADEQUATE ACCESS APPROVED BY THE APPROPRIATE APPROVAL AUTHORITY;

b. STREET RIGHT-OF-WAY BE DEDICATED WHERE THE STREET IS SUBSTANDARD IN WIDTH;

c. THE DEVELOPER COMMIT TO THE CONSTRUCTION OF THE STREETS, CURBS AND

SIDEWALKS TO CITY STANDARDS WITHIN THE DEVELOPMENT;

d. INDIVIDUAL DEVELOPERS PARTICIPATE IN THE IMPROVEMENT OF EXISTING STREETS, CURBS AND SIDEWALKS TO THE EXTENT OF THE DEVELOPMENT'S IMPACTS;

e. STREET IMPROVEMENTS BE MADE AND STREET SIGNS OR SIGNALS BE PROVIDED WHEN THE DEVELOPMENT IS FOUND TO CREATE OR INTENSIFY A TRAFFIC HAZARD;

f. TRANSIT STOPS, BUS TURNOUT LANES AND SHELTERS BE PROVIDED WHEN THE PROPOSED USE [IS] OF A TYPE WHICH GENERATES TRANSIT RIDERSHIP;

g. [II-56] PARKING SPACES BE SET ASIDE AND MARKED FOR CARS OPERATED BY DISABLED PERSONS AND THAT THE SPACES BE LOCATED AS CLOSE AS POSSIBLE TO THE ENTRANCE DESIGNED FOR DISABLED PERSONS; AND

h. LAND BE DEDICATED TO IMPLEMENT THE BICYCLE/PEDESTRIAN CORRIDOR IN ACCORDANCE WITH THE ADOPTED PLAN.

8.1.4 WHEN THE ACTUAL ROUTES OF FUTURE TRANSPORTATION IMPROVEMENTS HAVE NOT BEEN DETERMINED, THE CITY SHALL DESIGNATE STUDY AREAS ON THE COMPREHENSIVE PLAN TRANSPORTATION MAP AND PROVIDE GENERAL PROJECT DESCRIPTIONS TO:

a. IDENTIFY THE APPROXIMATE AREAS WITHIN WHICH THESE PROJECTS WILL OCCUR, AND;

b. TO EXPLAIN THE TYPE AND EXTENT OF THESE FUTURE IMPROVEMENTS.

8.1.5 WHEN REVIEWING DEVELOPMENT APPLICATIONS WITHIN COMPREHENSIVE TRANSPORTATION PLAN MAP STUDY AREAS, THE CITY SHALL WORK WITH APPLICANTS TO AVOID CONFLICT WITH THE LOCATION OF FUTURE TRANSPORTATION IMPROVEMENTS.

8.1.6 A CHANGE IN ROADWAY CLASSIFICATION, OR LOCATION SHALL REQUIRE AN AMENDMENT TO THE COMPREHENSIVE PLAN TRANSPORTATION MAP, AND; WHEN THE LOCATION OF ALL OR A PORTION OF A ROADWAY WITHIN A TRANSPORTATION MAP STUDY AREA HAS BEEN DETERMINED, THE MAP WILL BE AMENDED BY:

a. DESIGNATING THE LOCATION OF THE ROADWAY.

b. DESIGNATING ITS CLASSIFICATION, AND;

c. DELETING THE APPROPRIATE PORTION OF THE STUDY AREA INVOLVED.

8.1.7 THE CITY SHALL SUPPORT THE GOALS AND OBJECTIVES OF THE OREGON DEPARTMENT OF TRANSPORTATION TO IMPROVE TRAFFIC FLOW AND CAPACITY AT THE INTERCHANGE OF I-5 AND HIGHWAY 217/KRUSE WAY. HOWEVER, THE CITY RETAINS THE PREROGATIVE TO REVIEW, COMMENT AND CONCUR WITH THE ACTUAL ALIGNMENTS OF THE PROJECT.

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[II-59] 8.4 PEDESTRIAN AND BICYCLE PATHWAYS

Findings

- As the City of Tigard continues to grow, more people may rely on the bicycle and pedestrian pathways for utilitarian as well as for recreational purposes.
- In 1974, the City Council adopted a Comprehensive Pedestrian/Bicycle Pathway Plan.
- The City has required adjacent development to install that portion of the bicycle/pedestrian pathways shown on the adopted plan which abuts the development.
- The City has implemented portions of the adopted plan through the City's overlay program.
- The adopted Bicycle/Pedestrian Plan provides for a dual function pathway system; bicycles and pedestrians use the same system.

POLICY

8.4.1 THE CITY SHALL LOCATE BICYCLE/PEDESTRIAN CORRIDORS IN A MANNER WHICH PROVIDES FOR PEDESTRIAN AND BICYCLE USERS, SAFE AND CONVENIENT MOVEMENT IN ALL PARTS OF THE CITY, BY DEVELOPING THE PATHWAY SYSTEM SHOWN ON THE ADOPTED PEDESTRIAN/BIKEWAY PLAN.

IMPLEMENTATION STRATEGIES

1. The City shall review each development request adjacent to areas proposed for pedestrian/bike pathways to ensure that the adopted plan is properly implemented, and require the necessary easement or dedications for the pedestrian/bicycle pathways.

2. [II-60] The City shall review and update the adopted Pedestrian/Bikeway Plan on a regular basis to ensure all developing areas have accessibility to the Pedestrian/Bikeway system.
3. The City shall coordinate with Washington County to connect the City's Pedestrian/Bike Pathway system to the County's system.
4. City codes shall include provisions which prohibit motor driven vehicles on designated and maintained pedestrian/bicycle pathways.

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APPENDIX B

EXCERPTS FROM THE TIGARD COMMUNITY DEVELOPMENT CODE (CDC)

Chapter 18.10

CONSISTENCY WITH THE PLAN AND LAWS

Sections:

18.10.010 Consistency with the Plan and laws

18.10.010 Consistency with the Plan and Laws

A. Each development and use application and other procedure initiated under this title shall be consistent with the adopted comprehensive plan of the City of Tigard as implemented by this title and with applicable state and federal laws and regulations. All provisions of this title shall be construed in conformity with the adopted comprehensive plan. (Ord. 89-06; Ord. 83-52)

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Chapter 18.16

PRE-EXISTING APPROVALS

Sections:

18.16.010 Pre-existing Approvals

18.16.010 Pre-existing Approvals

A. Planned developments, including the approved density, subdivisions, projects requiring site development review approval or other development applications for which approvals were granted prior to the effective date of the code codified in this title may occur pursuant to such approvals.

B. All development proposals received by the Director after the adoption of this title shall be subject to review for conformance with the standards under this title or as otherwise provided by state law. (Ord. 89-06; Ord. 83-52)

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18.32.050 Application Submittal Requirements: Refusal of an Application

A. The application shall be made on forms provided by the Director as provided by Subsection 18.32.060.A.1.

B. The application shall:

1. Include the information requested on the application form;
2. Address appropriate criteria in sufficient detail for review and action;
3. Be accompanied by the required fee; and
4. Include a list of names and addresses of all persons who are surrounding property owners of record as required by the specific application section of this title. The records of the Washington County Department of Assessment and Taxation shall be the official records for determining ownership.

C. The Director shall not accept:

1. An incomplete application, except as otherwise provided by Section 18.32.080; or
2. Applications not accompanied by the required fee.

D. An application shall be deemed incomplete unless it addresses each element required to be

considered under applicable provisions of this code and the application form.

E. If an application for a permit or zone change is incomplete, the Director shall:

1. Notify the applicant within 30 days of receipt of the application of exactly what information is missing; and

2. Allow the applicant to submit the missing information.

F. The application for a permit or a zone change shall be deemed complete when the missing information is provided and at that time the 120-day time period shall begin to run for the purposes of satisfying state law.

G. If the applicant refuses to submit the missing information required for a permit or a zone change application, the application shall be deemed complete on the 31st day after the Director first received the application. This in no way negates the applicant's burden of proof, but it is for the purpose of allowing an application to be submitted for hearing. Ord. 90-41; Ord. 89.06; Ord. 83-52)

* * *

18.32.060 Duties of the Director

A. The Director shall:

1. Prepare application forms made pursuant to the standards contained in the applicable state law, comprehensive plan, and implementing ordinance provisions;

2. Accept all development applications which comply with the provisions of Section 18.32.050;

3. Within 60 days after an application is deemed complete pursuant to this chapter, except as provided by Section 18.32.110:

a. Give notice as provided by Sections 18.32.130 and 18.32.140 except as provided by Section 18.32.120;

b. Prepare a staff report or notice of decision which shall include:

(i) The facts deemed relevant to the proposal and found by the Director to be true;

(ii) Until the City's comprehensive plan is acknowledged, those statewide planning goals deemed to be applicable and the reasons why any other goal is not applicable to the proposal. The Director or approval authority need not deal with statewide planning goals 15-19, which are not applicable in Tigard;

(iii) Those portions of the Tigard comprehensive plan and implementing ordinances which the Director deems to be applicable to the proposal. If any portion of the plan or ordinances appear to be reasonably related to the proposal and are deemed not applicable by the Director, the Director shall explain why such portion or portions are not applicable;

(iv) An analysis relating the facts deemed true by the Director to the applicable criteria and a consideration of alternatives open to the approval authority, resulting in a recommendation of denial, approval, or approval with conditions under Section 18.32.250; and

(v) A statement regarding a waiver of information or additional information required by the Director as provided by Section 18.32.080;

c. In the case of an application subject to a Director's decision, make the staff report and all case-file materials available at the time the notice of the decision is given;

d. In the case of an application subject to a hearing, make the staff report available 7 days prior to a scheduled hearing date and the case-file materials available when notice is mailed, as provided by Section 18.32.130(A)(1).

e. Act on the development application pursuant to Subsection 18.32.090.A and Section 18.32.110 or cause a hearing to be held pursuant to Subsections 18.32.090.B through D and Sections 18.32.160 through 18.32.230 and Section 18.32.240, unless the applicant has requested or consented to a delay;

4. Administer the hearings process pursuant to Sections 18.32.130 through 18.32.190 and Section 18.32.200;

5. Maintain a register of all applications which have been filed for a decision. The register

shall identify at what stage the application is in the process;

6. File notice of the final decision in the records of the Planning Division and mail a copy of the notice of the final decision to the applicant and all parties and to those persons requesting copies of such notices who pay the necessary fees therefor as provided by Sections 18.32.120 or 18.32.130;

7. Maintain and preserve the file for each application. The file shall include, as applicable, a list of persons required to be given notice and a copy of the notice given pursuant to Section 18.32.120 or 18.32.130 and the accompanying affidavits, the application and all supporting information, the staff report, the final decision, including the findings, conclusions and conditions, if any, all correspondence, the minutes of any meeting at which the application was considered and any other exhibit, information or documentation which was considered by the hearing body with respect to the application; and

8. Administer the appeals and review process pursuant to Sections 18.32.290 through 18.32.370. (Ord. 90-41; Ord. 89-06; Ord. 84-69; Ord. 83-52)

* * *

18.32.250 The Decision Process of the Approval Authority

A. The decision shall be based on:

1. Proof by the applicant that the application fully complies with:

a. The City of Tigard comprehensive plan; and

b. The relevant approval standard found in the applicable chapter(s) of this title or other applicable implementing ordinances;

2. The standards and criteria that were applicable at the time the application was determined to be complete at such time as the City's plan and applicable ordinances are acknowledged.

B. Consideration may also be given to:

1. Proof of a change in the neighborhood or community or a mistake in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application; and

2. Factual oral testimony or written statements from the parties, other persons and other governmental agencies relevant to the existing conditions, other applicable standards and criteria, possible negative or positive attributes of the proposal or factors in Subsections A or B.1 of this section.

C. In all cases, the decision shall include a statement in a form addressing the requirements of Subsection 18.32.060.A.3.b which refers to the Director's staff report.

D. The approval authority may:

1. Adopt findings and conclusions contained in the staff report;

2. Adopt findings and conclusions of a lower approval authority;

3. Adopt its own findings and conclusions;

4. Adopt findings and conclusions submitted by any party provided all parties have had an opportunity to review the findings and comment on the same; or

5. Adopt findings and conclusions from another source, either with or without modification, having made a tentative decision, and having directed staff to prepare findings for review and to provide an opportunity for all parties to comment on the same.

E. The decision may be for denial, approval, or approval with conditions, pursuant to subsection 2 of this section.

1. Conditions may be imposed where such conditions are necessary to:

a. Carry out applicable provisions of the Tigard comprehensive plan;

b. Carry out the applicable implementing ordinances; and

c. Ensure that adequate public services are provided to the development or to ensure that other required improvements are made;

2. Conditions may include, but are not limited to; [sic]

a. Minimum lot sizes;

b. Larger setbacks;

c. Preservation of significant natural features; and

d. Dedication of easements;

3. Conditions of approval shall be fulfilled within the time limit set forth in the decision or, if no time limit is set forth, within one year. Failure to fulfill any condition of approval within the time limitations provided may be grounds for revocation of approval, after notice and an opportunity to be heard as an administrative action;

4. Changes, alterations or amendments to the substance of the conditions of approval shall be processed as a new administrative action;

5. Prior to the commencement of development, i.e. the issuance of any permits or the taking of any action under the approved development application, the owner and any contract purchasers of the property which is the subject of the approved application, may be required to sign and deliver to the Director their acknowledgment and consent to such conditions;

6. The conditional approval may require the owner of the property to sign within a time certain or, if no time is designated, within a reasonable time, a contract with the City for enforcement of the conditions and:

   a. The Council shall have the authority to execute such contracts on behalf of the City;

   b. If a contract is required by a conditional approval, no building permit shall be issued for the use covered by the application until the executed contract is recorded in a real property record of the applicable County and filed in the County records; and

   c. Such contracts shall be enforceable against the signing parties, their heirs, successors and assigns by the City by appropriate action in law or suit in equity for the benefit of appropriate action in law or suit in equity for the benefit of public health, safety, and welfare; and

7. A bond in a form acceptable to the Director or, upon appeal or review by the appropriate approval authority, a cash deposit from the property owners or contract purchasers in such an amount as will ensure compliance with the conditions imposed pursuant to the Section, may be required. Such bond or deposit shall be posted prior to the issuance of a building permit for the use covered by the application.

F. The final decision on the application may grant less than all of the parcel which is the subject of the application. (Ord. 90-41; Ord. 89-06; Ord. 83-52)

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Chapter 18.66

CBD: CENTRAL BUSINESS DISTRICT

Sections:

18.66.010 Purpose
18.66.020 Procedures and Approval Process
18.66.030 Permitted Uses
18.66.040 Conditional uses (See Chapter 18.130)

18.66.050 Dimensional Requirements: Nonresidential Uses
18.66.052 Dimensional Requirements: Residential Uses (R-40)
18.66.054 Dimensional Requirements: Residential Uses (R-12: Special District)
18.66.060 Additional Requirements

18.66.010 Purpose

A. The purpose of the CBD zoning district is to provide for a concentrated, central commercial office, and retail area which also provides civic, high density residential, and mixed uses. (Ord. 89-06; Ord. 83-52)

18.66.020 Procedures and Approval Process

A. A permitted use, Section 18.66.030, is a use which is allowed outright, but is subject to all applicable provisions of this title. If a use is not listed as a permitted use, it may be held to be a similar unlisted use under the provisions of Chapter 18.43, Unlisted Use.

B. A conditional use, Section 18.66.040, is a use the approval of which is discretionary with the Hearings Officer. The approval process and criteria for approval are set forth in Chapter 18.130, Conditional Use. If a use is not listed as a conditional use, it may be held to be a similar unlisted use under the provisions of Chapter 18.43, Unlisted Use. (Ord. 90-41; Ord. 89-06; Ord. 83-52)

18.66.030 Permitted Uses

A. Permitted uses in the CBD district are as follows:

1. Civic use types:
   a. Public administrative agency;
   b. Community recreation;
   c. Cultural exhibits and library services;
   d. Lodges, fraternal, and civic assembly;
   e. Parking facilities;
   f. Postal services;
   g. Public safety services;
   h. Public support facilities; and
   i. Religious assembly;
2. Commercial use types:
   a. Amusement enterprises;
   b. Animal sales and services:
      (i) Grooming; and
      (ii) Veterinary, small animals;
   c. Automotive and equipment:
      (i) Cleaning; and
      (ii) Repairing, light equipment;
   d. Building maintenance services;
   e. Business equipment sales and services;
   f. Business support services;
   g. Communication services;

h. Convenience sales and personal services;

i. Eating and drinking establishments;

j. Financial, insurance, and real estate services;

k. Food and beverage sales;

l. Medical and dental services;

m. Participation sports and recreation:

(i) Indoor; and

(ii) Outdoor;

n. Personal services, general;

o. Professional and administrative services;

p. Religious assembly;

q. Repair services, consumer;

r. Retail sales, general;

s. Transient lodging;

3. Residential Use Types (See R-40 and R-12 for development standards):

a. Single-family attached residential units;

b. Multiple-family residential units; and

c. Home occupations subject to provisions of Chapter 18.142.

d. The CBD zoning district allows for R-40 residential development except within the area south of Fanno Creek defined as follows:

e. All lands bounded by Fanno Creek, Hall Boulevard, Omara, Ash Avenue and Hill

Street within the CBD shall be designated R-12 PD and shall be developed as planned developments in conformance with the R-12 district standards.

f. Family day care;

4. Temporary use;

5. Fuel tank; or

6. Accessory structures. (Ord. 90-41; Ord. 89-06; Ord. 86-08; Ord. 84-73; Ord. 83-52)

18.66.040 Conditional Uses (See Chapter 18.130)

A. Conditional uses in the CBD district are as follows:

1. Adult entertainment;

2. Automotive and equipment sales/retail, light equipment;

3. Children's day care;

4. Utilities;

5. Heliports, in accordance with the Aeronautics Division (ODOT) and the FAA;

6. Hospitals;

7. Spectator sport and entertainment facilities;

8. Residential care facility;

9. Vehicle fuel sales; and

10. Wholesale, storage, and distribution. (Ord. 90-41; Ord. 89-06; Ord. 83-52)

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Chapter 18.84
SENSITIVE LANDS

Sections:

18.84.010 Purpose
18.84.015 Applicability of Uses: Permitted, Prohibited, and Nonconforming
18.84.020 Administration and Approval Process
18.84.025 Maintenance of Records
18.84.026 General Provisions for Floodplain Areas
18.84.028 General Provisions for Wetlands
18.84.030 Expiration of Approval: Standards of Extension of Time
18.84.040 Approval Standards
18.84.045 Exception for Development in the 108th/113th Ravine below the 140 Feet Elevation
18.84.050 Application Submission Requirements
18.84.060 Additional Information Required and Waiver of Requirements
18.84.070 Site Conditions
18.84.080 The Site Plan
18.84.090 Grading Plan
18.84.100 Landscaping Plan

18.84.010 Purpose

A. Sensitive lands are lands potentially unsuitable for development because of their location within

the 100-year floodplain, within natural drainageway, within a wetland area, on steep slopes, or on unstable ground.

B. Sensitive land areas are designated as such to protect the public health, safety, and welfare of the community through the regulation of these sensitive land areas.

C. Sensitive land regulations contained in this chapter are intended to maintain the integrity of the rivers, streams, and creeks in Tigard by minimizing erosion, promoting bank stability, maintaining and enhancing water quality, and fish and wildlife habitats, and preserving scenic quality and recreational potentials.

D. The regulations of this chapter are intended to implement the comprehensive plan and the Federal Emergency Management Agency's flood insurance program, and help to preserve natural sensitive land areas from encroaching use and to maintain the September 1981 zero-foot rise floodway elevation.

E. The areas of special flood hazard identified by the Federal Insurance Administration in a scientific and engineering report entitled "The Flood Insurance Study of the City of Tigard," dated September 1, 1981, with accompanying Flood Insurance Maps (updated February, 1984) is hereby adopted by reference and declared to be a part of this chapter. This Flood Insurance Study is on file at the Tigard Civic Center.

F. When base flood elevation data has not been provided in accordance with Subsection 18.84.010.E, the Director shall obtain, review and reasonably utilize any base flood elevation and floodway data available from a federal, state or

other source, in order to administer Subsections 18.84.026.I and J) [sic].

G. Where elevation data is not available either through the Flood Insurance Study or from another authoritative source, applications for building permits shall be reviewed to assure that proposed construction will be reasonably safe from flooding. The test of reasonableness is a local judgment and includes use of historical data, high water marks, photographs of past flooding, etc., where available. Failure to elevate at least two feet above grade in these sensitive land areas may result in higher insurance rates.

H. City actions under this chapter will recognize the rights of riparian owners to be free to act on the part of the City, its Commissions, representatives and agents, and land owners and occupiers.

I. For the purposes of this chapter, the word "structure" shall exclude: children's play equipment, picnic tables, sand boxes, shelters, grills, basketball hoops and similar recreational equipment. (Ord. 90-29; Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 83-52)

18.84.015 Applicability of Uses: Permitted, Prohibited, and Nonconforming

A. Except as provided by Subsection 18.84.015.B, the following uses are outright permitted uses within sensitive land areas:

1. Accessory uses such as lawns, gardens, or play areas, except in wetlands;

2. Agricultural uses conducted without locating a structure within the sensitive land area, except in wetlands;

3. Community recreation uses such as bicycle and pedestrian paths or athletic fields or parks, excluding structures, except in wetlands;

4. Public and private conservation areas for water, soil, open space, forest, and wildlife resources;

5. Removal of poison oak, tansy ragwort, blackberry, or other noxious vegetation;

6. Maintenance of floodway excluding rechanneling; and

7. Fences, except in the floodway area.

B. Separate permits shall be obtained from the appropriate community development division for the following:

1. Installation of underground utilities and construction of roadway improvements including sidewalks, curbs, streetlights, and driveway aprons;

2. Minimal ground disturbance(s) but no landform alterations; and

3. Repair, reconstruction, or improvement of an existing structure or utility, the cost of which is less than 50 percent of the market value of the structure prior to the improvement or the damage requiring reconstruction provided no development occurs in the floodway.

C. Landform alterations or developments within wetland areas that meet the jurisdictional requirements and permit criteria of the U.S. Army Corps of Engineers, Division of State Lands, Unified Sewerage Agency, and/or other federal, state, or regional agencies do not require

a sensitive lands permit. All other applicable City requirements must be satisfied, including sensitive land permits for areas meeting non-wetland sensitive land criteria.

D. A sensitive lands permit approval shall be obtained before construction or development begins within any area of special flood hazard or drainageway as established in Section 18.84.015.B and C. The permit shall apply to all structures including manufactured homes.

E. Except as explicitly authorized by other provisions of this chapter, all other uses are prohibited on sensitive land areas.

F. A use established prior to the adoption of this title, which would be prohibited by this Chapter or which would be subject to the limitations and controls imposed by this Chapter, shall be considered a nonconforming use. Nonconforming uses shall be subject to the provisions of Chapter 18.132. (Ord. 90-29; Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 84-36; Ord. 83-52)

18.84.020 Administration and Approval Process

A. The applicant for a sensitive lands permit shall be the recorded owner of the property or an agent authorized in writing by the owner.

B. A preapplication conference with City staff is required. (See Section 18.32.040.) If uncertainty exists in regards to the location or configuration of wetland areas, staff shall make an on-site inspection prior to an application being initiated to determine the nature and extent of the resource. If necessary, assistance from state and federal agencies shall be sought to provide the applicant additional information.

C. Due to possible changes in state statutes, or regional or local policy, information given by staff to the applicant during the preapplication conference is valid for not more than six months:

1. Another preapplication conference is required if any variance application is submitted more than six months after the preapplication conference; and

2. Failure of the Director to provide any of the information required by this chapter shall not constitute a waiver of the standard, criteria or requirements of the application.

D. The Hearings Officer shall approve, approve with conditions, or deny an application for a sensitive lands permit within the 100-year floodplain. The Hearings Officer's decision may be reviewed by the Council as provided by Subsection 18.32.310.B.

E. The Director shall approve, approve with conditions, or deny an application for a sensitive lands permit as set forth in Section 18.84.015.D. The decision made by the Director may be appealed to the Commission as provided by Subsection 18.32.310.A.

F. The appropriate approval authority shall review all sensitive lands permit applications to determine that all necessary permits shall be obtained from those federal, state, or local governmental agencies from which prior approval is also required.

G. The Director shall notify communities adjacent to the affected area and the State Department of Land Conservation and Development prior to any alteration or relocation of a watercourse, and submit evidence of such notification to the Federal Insurance Administration.

H. The Director shall require that maintenance is provided within the altered and relocated portion of said watercourse so that the flood-carrying capacity is not diminished.

I. The Hearings Officer and the Director shall apply the standards set forth in Section 18.84.040 when reviewing an application for a sensitive lands permit.

J. The Director shall give notice of applications to be heard by the Hearings Officer as provided by Section 18.32.130.

K. The Director shall mail notice of any sensitive lands application decision to the persons entitled to notice under Section 18.32.120. (Ord. 90-29; Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 83-52)

18.84.025 Maintenance of Records

A. Where base flood elevation data is provided through the Flood Insurance Study, the Building Official shall obtain and record the actual elevation (in relation to mean sea level) of the lowest floor (including basement) of all new or substantially improved structures, and whether or not the structure contains a basement.

B. For all new or substantially floodproofed structures, the Building Official shall:

1. Verify and record the actual elevation (in relation to mean sea level); and

2. Maintain the floodproofing certifications required in this chapter.

C. For all new or substantially floodproofed structures, the Director shall:

1. Maintain for public inspection all other records pertaining to the provisions in this chapter. (Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 83-52)

18.84.026 General Provisions

A. The appropriate approval authority shall review all permit applications to determine whether proposed building sites will be safe from flooding.

B. All new construction and substantial improvements shall be constructed with materials and utilize equipment resistant to flood damage.

C. All new construction and substantial improvements shall be constructed using methods and practices that minimize flood damage.

D. Electrical, heating, ventilation, plumbing, and air-conditioning equipment and other service facilities shall be designed and/or otherwise elevated or located so as to prevent water from entering or accumulating within the components during conditions of flooding.

E. All new and replacement water supply systems shall be designed to minimize or eliminate infiltration of floodwaters into the system in accordance with the Uniform Building Code and Uniform Plumbing Code.

F. All new construction, all manufactured homes and substantial improvements shall be anchored to prevent flotation, collapse, or lateral movement of the structure.

G. New and replacement sanitary sewerage systems shall be designed to minimize or eliminate infiltration of floodwater into the systems and discharge from the systems into floodwaters.

H. On-site water disposal systems shall be located to avoid impairment to them or contamination from them during flooding.

I. Residential Construction

1. New construction and substantial improvement of any residential structure shall have the lowest floor, including basement, elevated to or above base flood elevation; and

2. Fully enclosed areas below the lowest floor that are subject to flooding are prohibited, or shall be designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters. Designs for meeting this requirement must either be certified by a registered professional engineer or architect, or must meet or exceed the following minimum criteria:

a. A minimum of two openings having a total net area of not less than one square inch for every square foot of enclosed area subject to flooding shall be provided;

b. The bottom of all openings shall be no higher than one foot above grade; and

c. Openings may be equipped with screens, louvers, or other coverings or devices, provided that they permit the automatic entry and exit of flood waters.

J. Nonresidential Construction

1. New construction and substantial improvement of any commercial, industrial, or other nonresidential structure shall either have the lowest floor, including basement, elevated to the level of the base flood elevation, or together with attendant utility and sanitary facilities, shall:

a. Be floodproofed so that below the base flood level the structure is watertight with walls substantially impermeable to the passage of water;

b. Have structural components capable of resisting hydrostatic and hydrodynamic loads and effects of buoyancy;

c. Be certified by a registered professional engineer or architect that the design and methods of construction are in accordance with accepted standards of practice for meeting provisions of this subsection based on their development and/or review of the structural design, specifications and plans. Such certifications shall be provided to the Building Official as set forth in Subsection 18.84.025.B; and

d. Nonresidential structures that are elevated, not floodproofed, must meet the same standards for space below the lowest floor as described in 18.84.026.I.2. Applicants floodproofing nonresidential buildings shall be notified that flood insurance premiums will be based on

rates that are one foot below the flood-proofed level (e.g., a building constructed to the base flood level will be rated as one foot below that level). (Ord. 89-06; Ord. 87-66; Ord. 87-32)

18.84.028 General Provisions for Wetlands

A. Wetland regulations apply to those areas meeting the definition of wetland in Chapter 18.26 of the Community Development Code, areas meeting Division of State Lands wetland criteria and to land adjacent to and within 25 feet of a wetland. Wetland locations may include but are not limited to those areas identified as wetlands in "Wetland Inventory and Assessment for the City of Tigard, Oregon," Scientific Resources Incorporated, 1990.

B. Precise boundaries may vary from those shown on wetland maps; specific delineation of wetland boundaries may be necessary. Wetland delineation will be done by qualified professionals at the applicant's expense. (Ord. 90-29)

18.84.030 Expiration of Approval: Standards for Extension of Time

A. Approval of a sensitive lands permit shall be void if:

1. Substantial construction of the approved plan has not begun within a one-and-one-half year period; or

2. Construction on the site is a departure from the approved plan.

B. The Director shall, upon written request by the applicant and payment of the required fee, grant an extension of the approval period not to exceed one year, provided that:

1. No changes are made on the original plan as approved by the approval authority;

2. The applicant can show intent of initiating construction of the site within the one year extension period; and

3. There have been no changes to the applicable Comprehensive Plan policies and ordinance provisions on which the approval was based.

C. Notice of the decision shall be provided to the applicant. The Director's decision may be appealed by the applicant as provided by Subsection 18.32.310.A. (Ord. 90-41; Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 83-52)

18.84.040 Approval Standards

A. The Hearings Officer shall approve or approve with conditions an application request within the 100-year floodplain based upon findings that all of the following criteria have been satisfied:

1. Land form alterations shall preserve or enhance the floodplain storage function and maintenance of the zero-foot rise floodway shall not result in any narrowing of the floodway boundary;

2. Land form alterations or developments within the 100-year floodplain shall be allowed only in areas designated as commercial or industrial on the comprehensive plan land use map, except that alterations or

developments associated with community recreation uses, utilities, or public support facilities as defined in Chapter 18.42 of the Community Development Code shall be allowed in areas designated residential subject to applicable zoning standards;

3. Where a land form alteration or development is permitted to occur within the floodplain it will not result in any increase in the water surface elevation of the 100-year flood [plain];

4. The land form alteration or development plan includes a pedestrian/bicycle pathway in accordance with the adopted pedestrian/bicycle pathway plan, unless the construction of said pathway is deemed by the Hearings Officer as untimely;

5. The plans for the pedestrian/bicycle pathway indicate that no pathway will be below the elevation of an average annual flood;

6. The necessary U.S. Army Corps of Engineers and State of Oregon Land Board, Division of State Lands approvals shall be obtained; and

7. Where land form alterations and/or development are allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area within and adjacent to the floodplain in accordance with the comprehensive plan. This area shall include portions of a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle pathway plan.

B. The Director shall approve or approve with conditions an application request for a sensitive

lands permit on slopes of 25 percent or greater or unstable ground based upon findings that all of the following criteria have been satisfied:

1. The extent and nature of the proposed land form alteration or development will not create site disturbances to an extent greater than that required for the use;

2. The proposed land form alteration or development will not result in erosion, stream sedimentation, ground instability, or other adverse on-site and off-site effects or hazards to life or property;

3. The structures are appropriately sited and designed to ensure structural stability and proper drainage of foundation and crawl space areas for development with any of the following soil conditions: wet/high water table; high shrink-swell capability; compressible/organic; and shallow depth-to-bedrock; and

4. Where natural vegetation has been removed due to land form alteration or development, the areas not covered by structures or impervious surfaces will be replanted to prevent erosion in accordance with Chapter 18.100, Landscaping and Screening.

C. The Director shall approve or approve with conditions an application request for a sensitive lands permit within drainageways based upon findings that all of the following criteria have been satisfied:

1. The extent and nature of the proposed land form alteration or development will not create site disturbances to the extent greater than that required for the use;

2. The proposed land form alteration or development will not result in erosion, stream sedimentation, ground instability, or other adverse on-site and off-site effects or hazards to life or property;

3. The water flow capacity of the drainageway is not decreased;

4. Where natural vegetation has been removed due to land form alteration or development, the areas not covered by structures or impervious surfaces will be replanted to prevent erosion in accordance with Chapter 18.100, Landscaping and Screening;

5. The drainageway will be replaced by a public facility of adequate size to accommodate maximum flow in accordance with the adopted 1981 Master Drainage Plan.

6. The necessary U.S. Army Corps of Engineers and State of Oregon Land Board, Division of State Lands approvals shall be obtained.

7. Where landform alterations and/or development are allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area within and adjacent to the floodplain in accordance with the Comprehensive Plan. This area shall include portions of a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian bicycle pathway plan. (Ord. 90-29; Ord. 90-22; Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 86-08; Ord. 84-29; Ord. 83-52)

D. The Director shall approve or approve with conditions an application request for a sensitive lands

permit within wetlands based upon findings that all of the following criteria have been satisfied:

1. The proposed landform alteration or development is neither on wetland in an area designated as significant wetland on the Comprehensive Plan Floodplain and Wetland Map nor is within 25 feet of such a wetland;

2. The extent and nature of the proposed landform alteration or development will not create site disturbances to an extent greater than the minimum required for the use;

3. Any encroachment or change in on-site or off-site drainage which would adversely impact wetland characteristics have been mitigated;

4. Where natural vegetation has been removed due to landform alteration or development, erosion control provisions of the Surface Water Management program of Washington County must be met and areas not covered by structures or impervious surfaces will be replanted in like or similar species in accordance with Chapter 18.100, Landscaping and Screening;

5. All other sensitive lands requirements of this chapter have been met;

6. The provisions of Chapter 18.150; Tree Removal, shall be met.

7. Physical Limitations and Natural Hazards, Floodplains and Wetlands, Natural Areas, and Parks, Recreation and Open Space policies of the Comprehensive Plan have been satisfied. (Ord. 90-29; Ord. 89-06; Ord. 87-66; Ord. 87-32; Ord. 83-52)

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Chapter 18.86
ACTION AREAS

Sections:

18.86.010 Purpose
18.86.015 Applicability of Provisions
18.86.020 Permitted Use
18.86.030 Prohibited Use for New Developments
18.86.035 Conditional Use
18.86.040 Interim Requirements

18.86.010 Purpose

A. This chapter is designed to implement the policies of the comprehensive plan for action areas which include provisions for a mixture of intensive land uses. (Ord. 89-06; Ord. 87-56)

18.86.015 Applicability of Provisions

A. The provisions of this chapter apply to action areas as designated on the Comprehensive Plan Map: Land Use;

B. All development within an action area is subject to the review and application requirements under Sections 18.120.010 through 18.120.100 and Chapter 18.130 as modified in this chapter. (Ord. 89-06; Ord. 87-56)

18.86.020 Permitted Use

A. Permitted use allowed in an action area shall be as specified in the underlying zoning district. (Ord. 89-06; Ord. 87-56)

18.86.030 Prohibited Use for New Developments

A. The following use is prohibited for new developments:

1. Outdoor storage of materials, products, or supplies. No expansion of existing outdoor storage area will be permitted;

2. Overnight on-site outside storage of fleet vehicles in excess of two single-axle trucks; and

3. Overnight on-site outside storage of construction equipment. (Ord. 89-06; Ord. 87-56)

18.86.035 Conditional Use

A. The following are conditional uses in action areas:

1. Drive-up windows. (See standards contained in Chapter 18.130); and

2. Any other use specified as a conditional use in the underlying zone. (Ord. 89-06; Ord. 87-56)

18.86.040 Interim Requirements

A. In the absence of an adopted design plan, the following issues, under Subsection 18.86.040.A.1.c must be addressed for new developments as necessary to serve the use and provide for projected public facility needs of the area, pursuant to Chapter 18.164 as determined by the Director.

1. The City may attach conditions to any development within an action area prior to adoption of the design plan to achieve the following objectives:

   a. The development shall address transit usage by residents, employees, and customers if the site is within 1/4 mile of a public transit line or transit stop. Specific items to be addressed are as follows:

      (i) Orientation of buildings and facilities towards transit services to provide for direct pedestrian access into the building(s) from transit lines or stops;

      (ii) Minimizing transit/auto conflicts by providing direct pedestrian access into the buildings with limited crossings in automobile circulation/ parking areas. If pedestrian access crosses automobile circulation/parking areas, paths shall be marked for pedestrians;

      (iii) Encouraging transit-supportive users by limiting automobile support services to collector and arterial streets; and

      (iv) Avoiding the creation of small scattered parking areas by allowing adjacent developments to use shared surface parking, parking structures, or under-structure parking;

   b. The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designated

bikepaths or adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:

      (i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. If direct connections cannot be made, require that funds in the amount of the construction cost be deposited into an account for the purpose of constructing paths;

      (ii) Separation of auto and truck circulation activities from pedestrian areas;

      (iii) Encouraging pedestrian-oriented design by requiring pedestrian walkways and street level windows along all sides with public access into the building;

      (iv) Provision of bicycle parking as required under Subsection 18.106.020.P; and

      (v) Ensure adequate outdoor lighting by lighting pedestrian walkways and auto circulation areas.

   c. Coordination of development within the action area. Specific items to be addressed are as follows:

      (i) Continuity and/or compatibility of landscaping, circulation, access,

public facilities, and other improvements. Allow required landscaping areas to be grouped together. Regulate shared access where appropriate. Prohibit lighting which shines on adjacent property;

(ii) Siting and orientation of land use which considers surrounding land use, or an adopted plan. Screen loading areas and refuse dumpsters from view. Screen commercial and industrial use from single-family residential through landscaping; and

(iii) Provision of frontage roads or shared access where feasible. (Ord. 89-06; Ord. 87-56)

* * *

Chapter 18.120

SITE DEVELOPMENT REVIEW

Sections:

18.120.010 Purpose
18.120.020 Applicability of Provisions
18.120.030 Administration and Approval Process
18.120.040 Expiration of Approval: Standards for Extension of Time
18.120.050 Phased Development
18.120.060 Bonding and Assurances
18.120.070 Major Modification to Approved Plans or Existing Development

18.120.080 Minor Modification(s) to Approved Plans or Existing Development
18.120.090 Application Submission Requirements
18.120.100 Additional Information Required and Waiver of Requirements
18.120.110 Site Conditions
18.120.120 The Site Development Plan
18.120.130 Grading Plan
18.120.140 Architectural Drawings
18.120.150 Landscape Plan
18.120.160 Sign Drawings
18.120.170 Exceptions to Standards
18.120.180 Approval Standards

18.120.010 Purpose

A. The purpose and intent of site development review is to promote the general welfare by directing attention to site planning, and giving regard to the natural environment and the elements of creative design to assist in conserving and enhancing the appearance of the City.

B. It is in the public interest and necessary for the promotion of the health, safety and welfare, convenience, comfort and prosperity of the citizens of the City of Tigard:

1. To implement the City of Tigard's comprehensive plan and other approval standards in this code;

2. To preserve and enhance the natural beauties of the land and of the man-made environment, and enjoyment thereof;

3. To maintain and improve the qualities of and relationships between individual buildings, structures and the physical developments which best contribute to the amenities and attractiveness of an area or neighborhood;

4. To protect and ensure the adequacy and usefulness of public and private developments as they relate to each other and to the neighborhood or area; and

5. To ensure that each individual development provides for a quality environment for the citizens utilizing that development as well as the community as a whole.

C. In order to prevent the erosion of natural beauty, the lessening of environmental amenities, the dissipation of both usefulness and function, and to encourage additional landscaping, it is necessary:

1. To stimulate harmonious design for individual buildings, groups of buildings and structures, and other physical developments;

2. To encourage the innovative use of materials, methods, and techniques and flexibility in building placement; and

3. To integrate the functions, appearances and locations of buildings and improvements so as to best achieve a balance between private prerogatives and preferences, and the public interest and welfare. (Ord. 89-06; Ord. 83-52)

18.120.020 Applicability of Provisions

A. Site development review shall be applicable to all new developments and major modification of existing developments, as provided in Section 18.120.070 except it shall not apply to:

1. Single-family detached dwellings;

2. Manufactured homes on individual lots;

3. A duplex, which is not being reviewed as part of any other development;

4. Minor modifications as provided in Section 18.120.070;

5. Any proposed development which has a valid conditional use approved through the conditional use permit application process; or

6. Mobile home parks and subdivisions;

7. Family day care;

8. Home occupation;

9. Temporary use;

10. Fuel tank; or

11. Accessory structures. (Ord. 90-41; Ord. 89-06; Ord. 87-66; Ord. 84-61; Ord. 84-50; Ord. 83-52)

18.120.030 Administration and Approval Process

A. The applicant for a site development review proposal shall be the recorded owner of the property or an agent authorized in writing by the owner.

B. A preapplication conference with City staff is required. (See Section 18.32.040.)

C. Due to possible changes in state statutes, or regional or local policy, information given by staff to the applicant during the preapplication conference is valid for no more than six months:

1. Another preapplication conference is required if any site development application is submitted six months after the preapplication conference; and

2. Failure of the Director to provide any of the information required by this section shall not constitute a waiver of the standard, criteria or requirements applicable to the applications.

D. The Director shall approve, approve with conditions or deny any application for site development review as provided by Section 18.32.090. The Director shall apply the standards set forth in Section 18.120.180 when reviewing an application for site development review.

E. The decision of the Director may be appealed in accordance with Subsection 18.32.310.A.

F. The Director shall mail notice of any site development review proposal decision to the persons who may have the right to request a hearing before the Commission in accordance with Section 18.32.120. (Ord. 89-06; Ord. 83-52)

* * *

18.120.070 Major Modification to Approved Plans or Existing Development

A. An applicant may request approval of a modification to an approved plan or existing development by:

1. Providing the Director with three copies of the proposed modified site development plan; and

2. A narrative which indicates the rationale for the proposed modification addressing the changes listed in subsection B below.

B. The Director shall determine that a major modification(s) will result if one or more of the following changes are proposed. There will be:

1. An increase in dwelling unit density, or lot coverage for residential development;

2. A change in the ratio or number of different types of dwelling units;

3. A change that requires additional on-site parking in accordance with Chapter 18.106;

4. A change in the type of commercial or industrial structures as defined by the Uniform Building Code;

5. An increase in the height of the building(s) by more than 20 percent;

6. A change in the type and location of accessways and parking areas where off-site traffic would be affected;

7. An increase in vehicular traffic to and from the site and the increase can be expected to exceed 20 vehicles per day;

8. An increase in the floor area proposed for a nonresidential use by more than 10 percent excluding expansions under 5,000 square feet;

9. A reduction in the area reserved for common open space and/or usable open space which reduces the open space area below the minimum required by this code or reduces the open space area by more than 10 percent;

10. A reduction of project amenities below the minimum established by this code or by more than 10 percent where specified in the site plan:

    a. Recreational facilities;

    b. Screening; and/or

    c. Landscaping provisions; and

11. A modification to the conditions imposed at the time of site development review approval which are not the subject of B. 1 through 10 above of this subsection.

C. Upon determining that the proposed modification to the site development plan is a major modification, the applicant shall submit a new application in accordance with Sections 18.120.030 and 18.120.090 for site development review prior to any issuance of building permits.

D. The Director's decision may be appealed as provided by Subsection 18.32.310.A. Notice of the Director's decision need not be given. (Ord. 90-41; Ord. 89-06; Ord. 83-52)

18.120.080 Minor Modification(s) to Approved Plans or Existing Development

A. Any modification which is not within the description of a major modification as provided in Section 18.120.070 shall be considered a minor modification.

B. An applicant may request approval of a minor modification [by]:

    1. Providing the Director with three copies of the proposed modified site development plan; and

    2. A narrative which indicates the rationale for the proposed modification addressing the changes listed in Section 18.120.070.B.

C. A minor modification shall be approved, approved with conditions or denied following the Director's review based on the finding that:

    1. No code provisions will be violated; and

    2. The modification is not a major modification.

D. The Director's decision may be appealed as provided by Subsection 18.32.310.A. (Ord. 89-06; Ord. 83-52)

18.120.090 Application Submission Requirements

A. All applications shall be made on forms provided by the Director and shall be accompanied by:

    1. Copies of the site development plan(s) (number to be determined at the preapplication conference) and necessary data or narrative which explains how the development conforms to the standards, and:

a. The site development plan(s) and required drawings shall be drawn on sheets preferably not exceeding 18 inches by 24 inches;

b. The scale for a site development plan shall be an engineering scale; and

c. All drawings of structure elevations shall be a standard architectural scale, being 1/4 inch or 1/8 inch;

2. A list of the names and addresses of all persons who are property owners of record within 250 feet of the site; and

3. The required fee.

B. The required information may be combined on one map.

C. The site development plan, data, and narrative shall include the following:

1. An existing site conditions analysis, Section 18.120.110;

2. A site plan, Section 18.120.120;

3. A grading plan, Section 18.120.130;

4. A landscape plan, Section 18.120.150;

5. Architectural elevations of all structures, Section 18.120.140;

6. A sign plan, Section 18.120.160; and

7. A copy of all existing and proposed restrictions or covenants. (Ord. 89-06; Ord. 86-23; Ord. 83-52)

18.120.100 Additional Information Required and Waiver of Requirements

A. The Director may require information in addition to that required by this chapter in accordance with Subsection 18.32.080.A.

B. The Director may waive a specific requirement for information in accordance with Subsection 18.32.080.B and C. (Ord. 89-06; Ord. 83-52)

* * *

18.120.120 The Site Development Plan

A. The proposed site development plan shall be at the same scale as the site analysis and shall include the following information:

1. The proposed site and surrounding properties;

2. Contour line intervals (see Subsection 18.120.110.A.3);

3. The location, dimensions and names of all:

a. Existing and platted streets and other public ways and easements on the site and on adjoining properties; and

b. Proposed streets or other public ways and easements on the site;

* * *

18.120.180 Approval Standards

A. The Director shall make a finding with respect to each of the following criteria when approving, approving with conditions, or denying an application:

1. Provisions of the following chapters:

   a. Chapter 18.84, Sensitive Lands;

   b. Chapter 18.94, Manufactured/Mobile Home Regulations;

   c. Chapter 18.92, Density Computation;

   d. Chapter 18.144, Accessory Use and Structures;

   e. Chapter 18.96, Additional Yard Area Requirements;

   f. Chapter 18.98, Building Height Limitations: Exceptions;

   g. Chapter 18.100, Landscaping and Screening;

   h. Chapter 18.102, Visual Clearance Areas;

   i. Chapter 18.106, Off-Street Parking and Loading;

   j. Chapter 18.108, Access, Egress, and Circulation;

   k. Chapter 18.114, Signs;

   l. Chapter 18.150, Tree Removal; and

   m. Chapter 18.164, Street and Utility Improvement Standards.

* * *

18.120.180.A.8.

8. Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient

open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.

* * *

18.120.180.A.15.

15. Drainage:

   a. All drainage plans shall be designed in accordance with the criteria in the adopted 1981 master drainage plan [sic];

* * *

18.120.180.A.18.

18. All of the provisions and regulations of the underlying zone shall apply unless modified by other sections or this title (e.g., the Planned Development, Chapter 18.80; or a Variance granted under Chapter 18.134; etc.) (Ord. 90-41; Ord. 89-06; Ord. 84-29; Ord. 83-52)

* * *

Chapter 18.134

VARIANCE

Sections:

18.134.010 Purpose
18.134.020 Applicability of Provisions
18.134.030 Administration and Approval Process

18.134.040 Expiration of Approval: Standards for Extension of Time
18.134.050 Criteria for Granting a Variance
18.134.060 Application Submission Requirements
18.134.070 The Site Plan

18.134.010 Purpose

A. The purpose of this chapter is to provide standards for the granting of variances from the applicable zoning requirements of this title where it can be shown that, owing to special and unusual circumstances related to a specific piece of the land, the literal interpretation of the provisions of the applicable zone would cause an undue or unnecessary hardship, except that no use variances shall be granted. (Ord. 89-06; Ord. 83-52)

18.134.020 Applicability of Provisions

A. The variance standards are intended to apply to individual platted and recorded lots only.

B. An applicant who is proposing to vary a specification standard for lots yet to be created through a subdivision process may not utilize the variance procedure unless otherwise specified in Chapter 18.148, Zero Lot Line Setback Standards, or Chapter 18.160, Land Division: Subdivision. (Ord. 89-06; Ord. 83-52)

18.134.030 Administration and Approval Process

A. The applicant for a variance shall be the recorded owner of the property or an agent authorized in writing by the owner.

B. A preapplication conference with City staff shall be required. (See Section 18.32.040.)

C. Due to possible changes in state statutes, or regional or local policy, information given by staff to the applicant during the preapplication conference is valid for no more than six months:

1. Another preapplication conference is required if any variance application is submitted six months after the preapplication conference; and

2. Failure to the Director to provide any of the information required by this chapter shall not constitute a waiver of the standard, criteria or requirements of the applications.

D. The Director shall approve, approve with conditions, or deny any application for a variance. The Director shall apply the standards set forth in Section 18.134.050 when reviewing an application for a variance.

E. The decision of the Director may be appealed in accordance with Subsection 18.32.310.A.

F. The Director shall mail notice of any variance decision to persons who are entitled to notice in accordance with Section 18.32.130. (Ord. 89-06; Ord. 83-52)

* * *

18.134.050 Criteria for Granting a Variance

A. The Director shall approve, approve with conditions, or deny an application for a variance based on finding that the following criteria are satisfied:

1. The proposed variance will not be materially detrimental to the purposes of this title, be in conflict with the policies of the comprehensive plan, to any other applicable policies and standards, and to other properties in the same zoning district or vicinity;

2. There are special circumstances that exist which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, and which are not applicable to other properties in the same zoning district;

3. The use proposed will be the same as permitted under this title and City standards will be maintained to the greatest extent that is reasonably possible while permitting some economic use of the land;

4. Existing physical and natural systems, such as but not limited to traffic, drainage, dramatic land forms, or parks will not be adversely affected any more than would occur if the development were located as specified in the title; and

5. The hardship is not self-imposed and the variance requested is the minimum variance which would alleviate the hardship.

B. The Director shall approve, approve with modifications, or deny an application for an access

variance in accordance with the criteria set forth in Section 18.108.150.

C. The Director shall approve, approve with modifications, or deny an application for a subdivision variance subject to the criteria set forth in Section 18.160.120. (Ord. 89-06; Ord. 83-52)

* * *

Chapter 18.164

STREET AND UTILITY IMPROVEMENT STANDARDS

Sections:

18.164.010 Purpose
18.164.020 General Provisions
18.164.030 Streets
18.164.040 Blocks
18.164.050 Easements
18.164.060 Lots
18.164.070 Sidewalks
18.164.080 Public Use Areas
18.164.090 Sanitary Sewers
18.164.100 Storm Drainage
18.164.110 Bikeways
18.164.120 Utilities
18.164.130 Cash or Bond Required
18.164.140 Monuments
18.164.150 Installation: Prerequisite/Permit Fee
18.164.160 Installation: Conformation Required
18.164.170 Plan Checking Required
18.164.180 Notice of City Required
18.164.190 City Inspection Required
18.164.200 Engineer's Certification Required

18.164.010 Purpose

A. The purpose of this chapter is to provide construction standards for the implementation of public and private facilities and utilities such as streets, sewers, and drainage. (Ord. 89-06; Ord. 83-52)

18.164.020 General Provisions

A. Unless otherwise provided, the standard specifications for construction, reconstruction or repair of streets, sidewalks, curbs and other public improvements within the City shall occur in accordance with the standards of this title.

B. The City Engineer may recommend changes or supplements to the standard specifications consistent with the application of engineering principles.

C. No vehicles on a building construction site shall be allowed on unimproved surfaces.

D. The provision of Section 7.40 of the Tigard Municipal Code shall apply to this chapter. (Ord. 89-06; Ord. 83-52)

18.164.030 Streets

A. Improvements:

1. No development shall occur unless the development has frontage or approved access to a public street:

a. Streets within a development and streets adjacent shall be improved in accordance with this title;

b. Any new street or additional street width planned as a portion of an approved street plan shall be dedicated and improved in accordance with this code; and

c. The Director may accept a future improvement guarantee in lieu of the street improvements if one or more of the following conditions exists:

(i) A partial improvement is not feasible due to the inability to achieve property design standards;

(ii) A partial improvement may create a potential safety hazard to motorists or pedestrians;

(iii) Due to the nature of existing development on adjacent properties it is unlikely that street improvements would be extended in the foreseeable future and the improvement associated with the project under review does not, by itself, provide a significant improvement to street safety or capacity;

(iv) The improvement would be in conflict with an adopted capital improvement plan;

(v) The improvement is associated with an approved land partition on property zoned residential and the proposed land partition does not create any new streets; or

(vi) Additional planning work is required to define the appropriate

design standards for the street and the application is for a project which would contribute only a minor portion of the anticipated future traffic on the street.

B. Creation of Rights-of-way for Streets and Related Purposes:

1. Rights-of-way shall be created through the approval of a final subdivision plat or major partition; however, the Council may approve the creation of a street by acceptance of a deed, provided that such street is deemed essential by the Council for the purpose of general traffic circulation:

a. The Council may approve the creation of a street by deed of dedication without full compliance with the regulations applicable to subdivisions or major partitions if any one or more of the following conditions are found by the Council to be present:

(i) Establishment of a street is initiated by the Council and is found to be essential for the purpose of general traffic circulation, and partitioning of [sic] subdivision of land has an incidental effect rather than being the primary objective in establishing the road or street for public use; and

(ii) The tract in which the road or street is to be dedicated is an isolated ownership of one acre or less and such dedication is recommended by the Commission to the

Council based on a finding that the proposal is not an attempt to evade the provisions of this title governing the control of subdivisions or major partitions;

b. With each application for approval of a road or street right-of-way not in full compliance with the regulations applicable to the standards, the proposed dedication shall be made a condition of subdivision and major partition approval:

(i) The applicant shall submit such additional information and justification as may be necessary to enable the Commission in its review to determine whether or not a recommendation for approval by the Council shall be made;

(ii) The recommendation, if any, shall be based upon a finding that the proposal is not in conflict with the purpose of this title;

(iii) The Commission in submitting the proposal with a recommendation to the Council may attach conditions which are necessary to preserve the standards of this title; and

(iv) All deeds of dedication shall be in a form prescribed by the City and shall name "the City of Tigard,

Oregon" or "the public," whichever the City may require, as grantee.

* * *

D. Street Location, Width and Grade:

1. The location, width and grade of all streets shall conform to an approved street plan and shall be considered in their relation to existing and planned streets, to topographic conditions, to public convenience and safety, and in their appropriate relation to the proposed use of the land to be served by such streets:

   a. Street grades shall be approved by the public works Director [sic] in accordance with Subsection M below; and

   b. Where the location of a street is not shown in an approved street plan, the arrangement of streets in a development shall either:

      (i) Provide for the continuation or appropriate projection of existing streets in the surrounding areas, or

      (ii) Conform to a plan adopted by the Council, if it is impractical to conform to existing street patterns because of particular topographical or other existing conditions of the land. Such a plan shall be based on the type of land use to be served, the volume of traffic, the capacity of adjoining streets and the need for public convenience and safety.

E. Minimum Rights-of-Way and Street Widths:

1. Unless otherwise indicated on an approved street plan, the street right-of-way and roadway widths shall not be less than the minimum width described below (see Comprehensive Plan: Transportation). Where a range is indicated, the width shall be determined by the City.

   a. In Developing Areas:

Type of Street	Minimum Right-of-way Width (feet)	Minimum Roadway Width (feet)	Moving Lanes
Arterial	60-90	12'/lane	2-4
Major Collector	60-80	44'	2-4
Minor Collector	60	40'	2-3
Local Street	50	34'	2
Local Streets (planned developments only with equal off-street parking)	50	26'	2
Cul-de-sac dead-end streets, (not more than 400' long)	50	34'	2
Turn-arounds for dead-end streets	50' radius	42' radius	
Alley: Residential, Business or Industrial	20	20'	
	20	20'	

b. In established areas improvements to streets shall be made according to adopted City standards, unless the approval authority determines that the public benefit in a particular case does not warrant imposing an expected severe, adverse impact on the existing development. Any required variances to the standards shall be in the following priority order:

(i) Narrow or eliminate landscape strips;

(ii) Narrow or eliminate on-street parking;

(iii) Narrow or eliminate sidewalks and/or bike trails;

(iv) Eliminate left turn lanes; and

(v) Narrow travel lanes.

* * *

18.164.050 Easements

A. Easements:

1. Easements for sewers, drainage, water mains, electric lines or other public utilities shall be either dedicated or provided for in the deed restrictions, and:

a. Where a development is traversed by a watercourse, or drainageway, there shall be provided a storm water easement or

drainage right-of-way conforming substantially with the lines of the watercourse, and such further width management purposes.

B. Unility Easements:

1. A property owner proposing a development shall make arrangements with the City, the applicable district and each utility franchise for the provision and dedication of utility easements necessary to provide full services to the development:

a. The City's standard width for public main line utility easements shall be 15 feet unless otherwise specified by the utility company, applicable district, or City Engineer; and

b. Where feasible utility easements shall be all on one lot. (Ord. 89-06; Ord. 83-52)

* * *

18.164.070 Sidewalks

A. Sidewalks: Required

1. Except where exempted by the Commission, sidewalks shall be constructed, replaced or repaired to City design standards as set forth in the standard specifications manual and located as follows:

a. On both sides of arterial and collector streets to be built at the time of street construction;

b. On both sides of all other streets and in pedestrian easements and rights-of-way,

except as provided further in this section, to be constructed along all portions of the property designated for pedestrian ways in conjunction with development of the property; and

c. On one side of any industrial street to be constructed at the time of street construction or after determination of curb cut locations.

B. A planter strip separation of at least five feet between the curb and the sidewalk shall be required in the design of any arterial or collector street where parking is prohibited adjacent to the curb, except where the following conditions exist: there is inadequate right-of-way; the curbside sidewalks already exist on predominant portions of the street; or it would conflict with the utilities.

C. In the central business district sidewalks shall be 10 feet in width, and:

1. All sidewalks shall provide a continuous unobstructed path; and

2. The width of curbside sidewalks shall be measured from the back of the curb.

D. Maintenance:

1. Maintenance of sidewalks, curbs, and planter strips is the continuing obligation of the adjacent property owner.

E. Application for Permit and Inspection:

1. If the construction of a sidewalk is not included in a performance bond of an approved subdivision or the performance bond has lapsed, then every person, firm or corporation desiring to construct sidewalks as provided by this chapter, shall, before entering upon the work or improvement, apply for a street opening permit to the public works department to so build or construct:

a. An occupancy permit shall not be issued for a development until the provisions of this section are satisfied.

b. The City Engineer may issue a permit and certificate allowing temporary noncompliance with the provisions of this section to the owner, builder or contractor when, in his opinion, the construction of the sidewalk is impractical for one or more of the following reasons:

(i) Sidewalk grades have not and cannot be established for the property in question within a reasonable length of time;

(ii) Forthcoming installation of public utilities or street paving would be likely to cause severe damage to the new sidewalk;

(iii) Street right-of-way is insufficient to accommodate a sidewalk on one or both sides of the street; or

(iv) Topography or elevation of the sidewalk base area makes construction of a sidewalk impractical or economically infeasible; and

c. The City Engineer shall inspect the construction of sidewalks for compliance with the provision[s] set forth in the standard specifications manual.

F. Council Initiation of Construction:

1. In the event one or more of the following situations are found by the Council to exist, the Council may adopt a resolution to initiate construction of a sidewalk in accordance with City ordinances:

a. A safety hazard exists for children walking to or from school and sidewalks are necessary to eliminate the hazard;

b. A safety hazard exists for pedestrians walking to or from a public building, commercial area, place of assembly or other general pedestrian traffic, and sidewalks are necessary to eliminate the hazard;

c. 50 percent or more of the area in a given block has been improved by the construction of dwellings, multiple dwellings, commercial buildings or public buildings and/or parks; and

d. A criteria which allowed noncompliance under Section E.1.b above no longer exists and a sidewalk could be constructed in conformance with City standards. (Ord. 89-06; Ord. 83-52)

* * *

18.164.100 Storm Drainage

A. Storm Drainage: General Provisions:

1. The Director and City Engineer shall issue a development permit only where adequate provisions for storm water and flood water runoff have been made, and:

a. The storm water drainage system shall be separate and independent of any sanitary sewerage system;

b. Where possible, inlets shall be provided so surface water is not carried across any intersection or allowed to flood any street; and

c. Surface water drainage patterns shall be shown on every development proposal plan.

B. Easements:

1. Where a subdivision is traversed by a watercourse, drainageway, channel or stream, there shall be provided a storm water easement or drainage right-of-way conforming substantially with the lines of such watercourse and such further width as will be adequate fo conveyance and maintenance.

C. Accommodation of Upstream Drainage:

1. A culvert or other drainage facility shall, and in each case be, large enough to accommodate potential runoff from its entire upstream drainage area, whether inside or outside the development, and:

a. The City Engineer shall determine the necessary size of the facility, based on the provisions of the 1981 master drainage plan [sic].

D. Effect on Downstream Drainage:

1. Where it is anticipated by the City Engineer that the additional runoff resulting from the development will overload an existing drainage facility, the Director and Engineer shall withhold approval of the development until provisions have been made for improvement of the potential condition or until provisions have been made for storage of additional runoff caused by the development in accordance with the 1981 master drainage plan [sic]. (Ord. 89-06; Ord. 83-52)

18.164.110 Bikeways

A. Developments adjoining proposed bikeways identified on the adopted pedestrian/bikeway plan shall include provisions for the future extension of such bikeways through the dedication of easements or rights-of-way.

B. Development permits issued for planned unit developments, conditional use permits, and other developments which will principally benefit from such bikeways shall be conditioned to include the cost of bikeway improvements.

C. Where possible, bikeways should be separated from other modes of travel including pedestrians.

D. Minimum width for bikeways is six feet per travel lane. (Ord. 89-06; Ord. 83-52)

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APPENDIX C

EXCERPTS FROM THE OREGON REVISED STATUTES (ORS)

197.825 Jurisdiction of board; limitations; effect on circuit court jurisdiction. (1) Except as provided in ORS 197.320 and subsections (2) and (3) of this section, the board shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

(2) The jurisdiction of the board:

(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review;

(b) Is subject to the provisions of ORS 197.850 relating to judicial review by the Court of Appeals;

(c) Does not include those matters over which the department has review authority under ORS 197.430 to 197.455, 197.649 and 197.650;

(d) Does not include those land use decisions of a state agency over which the Court of Appeals has jurisdiction for initial judicial review under ORS 183.400, 183.482 or other statutory provisions;

(e) Does not include any rules, programs, decisions, determinations or activities carried out under ORS 527.610 to 527.770, 527.990 (1) and 527.992; and

(f) Is subject to ORS 196.115 for any county land use decision that may be reviewed by the Columbia River Gorge Commission pursuant to sections 10(c) or 15(a)(2)

of the Columbia River Gorge National Scenic Area Act, P.L. 99-663.

(3) Notwithstanding subsection (1) of this section, the circuit courts of this state retain jurisdiction:

(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015 (10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; and

(b) To enforce orders of the board in appropriate proceedings brought by the board or a party to the board proceeding resulting in the order. [1983 c.827 §30; 1987 c.729 §14; 1987 c.856 §9; 1987 c.919 §4; 1989 c.761 §11; 1991 c.817 §4]

* * *

197.829 Board to affirm certain local government interpretations. The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

(1) Is inconsistent with the express language of the comprehensive plan or land use regulation;

(2) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

(3) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

(4) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements. [1993 c.792 §43]

197.830 Review procedures; standing; deadlines; issues subject to review; attorney fees and costs; publication of orders; mediation. (1) Review of land use decisions or limited land use decisions under ORS 197.830 to 197.845 shall be commenced by filing a notice of intent to appeal with the Land Use Board of Appeals.

(2) Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:

(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and

(b) Appeared before the local government, special district or state agency orally or in writing.

(3) If a local government makes a land use decision without providing a hearing or the local government makes a land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

(a) Within 21 days of actual notice where notice is required; or

(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.

(4) If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

(a) Within 21 days of actual notice where notice is required; or

(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.

(5)(a) Except as provided in paragraph (b) of this subsection, the appeal period described in subsection (3) of this section shall not exceed three years after the date of the decision.

(b) If notice of a hearing or an administrative decision made pursuant to ORS 197.763, 197.195, 215.416 (11) or ORS 227.175 (10) is required but has not been provided, the provisions of paragraph (a) of this subsection do not apply.

(6)(a) Within a reasonable time after a petition for review has been filed with the board, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.

(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be

made a party to the review proceedings, as set forth in subsection (1) of this section, are:

(A) The applicant who initiated the action before the local government, special district or state agency; or

(B) Persons who appeared before the local government, special district or state agency, orally or in writing.

(7) If a state agency whose order, rule, ruling, policy or other action is at issue is not a party to the proceeding, it may file a brief with the board as if it were a party. The brief shall be due on the same date the respondent's brief is due.

(8) A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after the decision sought to be reviewed is mailed to parties entitled to notice under ORS 197.615. Copies of the notice of intent to appeal shall be served upon the local government, special district or state agency and the applicant of record, if any, in the local government, special district or state agency proceeding. The notice shall be served and filed in the form and manner prescribed by rule of the board and shall be accompanied by a filing fee of $50 and a deposit for costs to be established by the board. If a petition for review is not filed with the board as required in subsections (9) and (10) of this section, the filing fee and deposit shall be awarded to the local government, special district or state agency as cost of preparation of the record.

(9)(a) Within 21 days after service of the notice of intent to appeal, the local government, special district or state agency shall transmit to the board the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceeding the record may be shortened. The board may require or permit subsequent corrections to the record.

(b) Within 10 days after service of a notice of intent to appeal, the board shall provide notice to the petitioner and the respondent of their option to enter into mediation pursuant to ORS 197.860. Any person moving to intervene shall be provided such notice within seven days after a motion to intervene is filed. The notice required by this paragraph shall be accompanied by a statement that mediation information or assistance may be obtained from the Department of Land Conservation and Development, the coordinating agency for the Natural Resources Section of the Public Policy Dispute Resolution Program.

(10) A petition for review of the land use decision or limited land use decision and supporting brief shall be filed with the board as required by the board under subsection (12) of this section. Issues shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763. A petitioner may raise new issues to the board if:

(a) The local government failed to follow the requirements of ORS 197.763; or

(b) The local government made a land use decision or limited land use decision which is different from the proposal described in the notice to such a degree that the

notice of the proposed action did not reasonably describe the local government's final action.

(11) The petition shall include a copy of the decision sought to be reviewed and shall state:

(a) The facts that establish that the petitioner has standing.

(b) The date of the decision.

(c) The issues the petitioner seeks to have reviewed.

(12)(a) The board shall adopt rules establishing deadlines for filing petitions and briefs and for oral argument.

(b) At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as the board may allow, affirm, modify or reverse its decision. If the petitioner is dissatisfied with the local government or agency action after withdrawal for purposes of reconsideration, the petitioner may refile the notice of intent and the review shall proceed upon the revised order. An amended notice of intent shall not be required if the local government or state agency, on reconsideration, affirms the order or modifies the order with only minor changes.

(13)(a) Review of a decision under ORS 197.830 to 197.845 shall be confined to the record.

(b) In the case of disputed allegations of unconstitutionality of the decision, standing, ex parte contacts or

other procedural irregularities not shown in the record which, if proved, would warrant reversal or remand, the board may take evidence and make findings of fact on those allegations. The board shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record.

(14) The board shall issue a final order within 77 days after the date of transmittal of the record. If the order is not issued within 77 days the applicant may apply in Marion County or the circuit court of the county where the application was filed for a writ of mandamus to compel the board to issue a final order.

(15)(a) Upon entry of its final order the board may, in its discretion, award costs to the prevailing party including the cost of preparation of the record if the prevailing party is the local government, special district or state agency whose decision is under review. The deposit required by subsection (8) of this section shall be applied to any costs charged against the petitioner.

(b) The board may also award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded, and primarily for a purpose other than to secure appropriate action by the board.

(16) Orders issued under this section may be enforced in appropriate judicial proceedings.

(17)(a) The board shall provide for the publication of its orders that are of general public interest in the form

it deems best adapted for public convenience. The publications shall constitute the official reports of the board.

(b) Any moneys collected or received from sales by the board shall be paid into the Board Publications Account established by ORS 197.832.

(18) Except for any sums collected for publication of board opinions, all fees collected by the board under this section that are not awarded as costs shall be paid over to the State Treasurer to be credited to the General Fund. [1983 c.827 §31; 1985 c.119 §3; 1987 c.278 §1; 1987 c.729 §16; 1989 c.761 §12; 1991 c.817 §7; 1993 c.143 §1; 1993 c.310 §1]

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APPENDIX D

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EXCERPTS FROM THE OREGON ADMINISTRATIVE RULES

GOAL 7: AREAS SUBJECT TO NATURAL DISASTERS AND HAZARDS

OAR 660-15-000(7)

To protect life and property from natural disasters and hazards.

Developments subject to damage or that could result in loss of life shall not be planned nor located in known areas of natural disasters and hazards without appropriate safeguards. Plans shall be based on an inventory of known areas of natural disaster[s] and hazards.

Areas of Natural Disasters and Hazards – are areas that are subject to natural events that are known to result in death or endanger the works of man, such as stream flooding, ocean flooding, ground water, erosion and deposition, landslides, earthquakes, weak foundation soils and other hazards unique to local or regional areas.

* * *

GOAL 11: PUBLIC FACILITIES AND SERVICES

OAR 660-15-000(11)

To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.

Urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to, the

needs and requirements of the urban, urbanizable, and rural areas to be served. A provision for key facilities shall be included in each plan. Cities or counties shall develop and adopt a public facility plan for areas within an urban growth boundary containing a population greater than 2,500 persons. To meet current and long-range needs, a provision for solid waste disposal sites, including sites for inert waste, shall be included in each plan.

In accordance with ORS 197.180 and Goal 2, state agencies that provide funding for transportation, water supply, sewage and solid waste facilities shall identify in their coordination programs how they will coordinate that funding with other state agencies and with the public facility plans of cities and counties.

A Timely, Orderly and Efficient Arrangement – refers to a system or plan that coordinates the type, locations and delivery of public facilities and services in a manner that best supports the existing and proposed land uses.

Rural Facilities and Services – refers to facilities and services which the governing body determines to be suitable and appropriate solely for the needs of rural use.

Urban Facilities and Services – refers to key facilities and to appropriate types and levels of at least the following: police protection; sanitary facilities; storm drainage facilities; planning, zoning and subdivision control; health services; recreation facilities and services; energy and communication services; and community governmental services.

Public Facilities Plan – A public facility plan is a support document or documents to a comprehensive plan. The facility plan describes the water, sewer and transportation facilities which are to support the land uses designated in the appropriate acknowledged comprehensive plan or plans within an urban growth boundary containing a population greater than 2,500.

GOAL 12: TRANSPORTATION

OAR 660-15-000(12)

To provide and encourage a safe, convenient and economic transportation system.

A transportation plan shall (1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian; (2) be based upon an inventory of local, regional and state transportation needs; (3) consider the differences in social consequences that would result from utilizing differing combinations of transportation modes; (4) avoid principal reliance upon any one mode of transportation; (5) minimize adverse social, economic and environmental impacts and costs; (6) conserve energy; (7) meet the needs of the transportation disadvantaged by improving transportation services; (8) facilitate the flow of goods and services so as to strengthen the local and regional economy; and (9) conform with local and regional comprehensive land use plans. Each plan shall include a provision for transportation as a key facility.

Transportation – refers to the movement of people and goods.

Transportation Facility – refers to any physical facility that moves or assists in the movement of people and goods excluding electricity, sewage and water.

Transportation System – refers to one or more transportation facilities that are planned, developed, operated and maintained in a coordinated manner to supply continuity of movement between modes, and within and between geographic and jurisdictional areas.

Mass Transit – refers to any form of passenger transportation which carries members of the public on a regular and continuing basis.

Transportation Disadvantaged – refers to those individuals who have difficulty in obtaining transportation because of their age, income, physical or mental disability.

* * *

DEFINITIONS

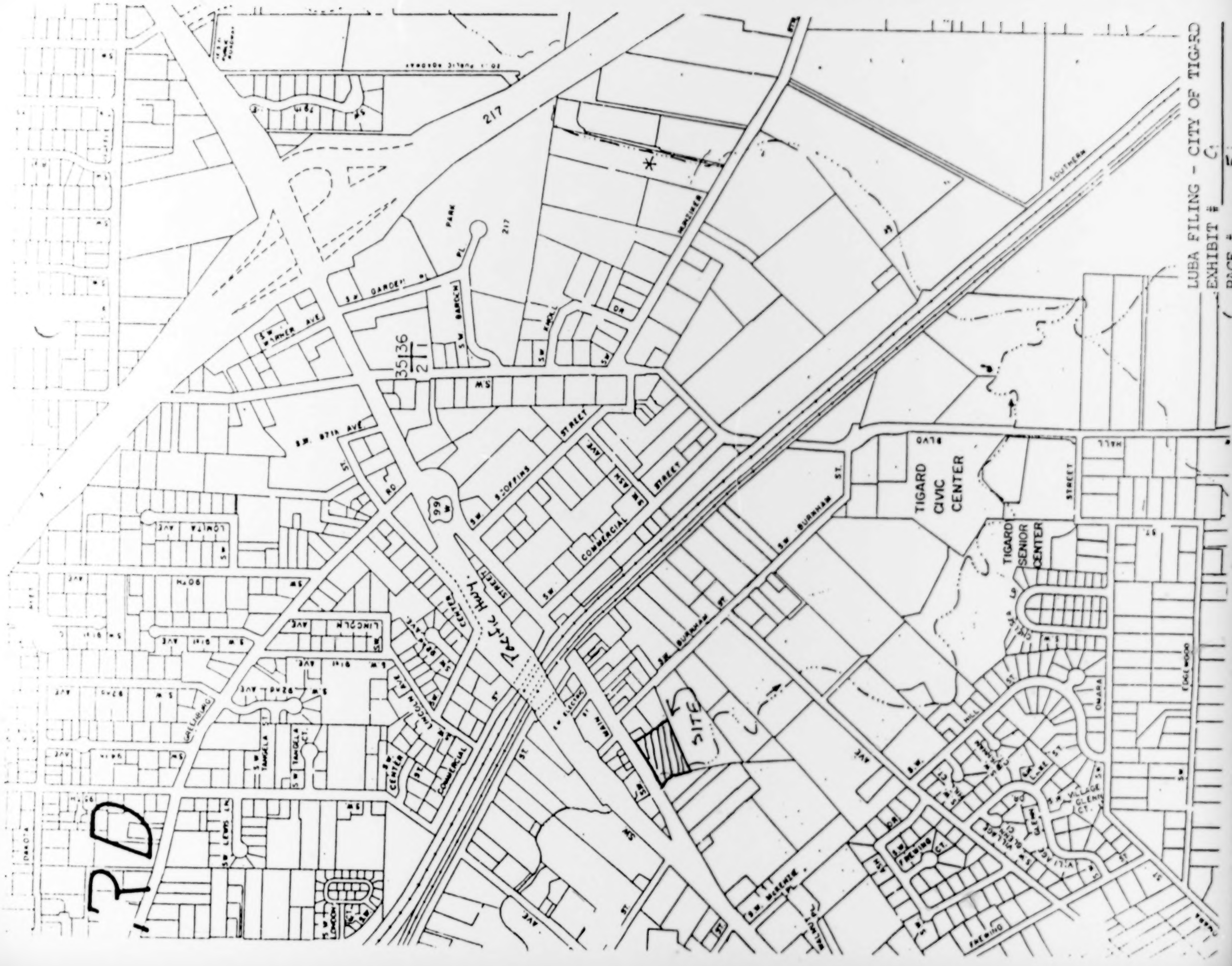
OAR 660-15-000

KEY FACILITIES. Basic facilities that are primarily planned for by local government but which also may be provided by private enterprise and are essential to the support of more intensive development, including public schools, transportation, water supply, sewage and solid waste disposal.

APPENDIX E

EXCERPTS FROM THE OREGON SUPREME COURT RECORD

* * *


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EXHIBIT #
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PARK PL.
SW BARROW
SW HALL
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SOUTHERN
35136
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SW 87TH AVE
SW SHOPPING
STREET
SW COMMERCIAL
99W
TIGARD CIVIC CENTER
TIGARD SENIOR CENTER
SW BURNHAM ST.
SITE
SW MAIN ST.
SW HEMLOCK PL.
SW LINCOLN
SW CENTER
SW TANGELA
SW LOMBARD
SW LEWIS LN.
SW VILLAGE GLENN CT.
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R-Doc. No. B, Pages 151-156, 158-160

KNAPPENBERGER & MENDEZ

ATTORNEYS AT LAW

HONEYMAN HOUSE
1318 S.W. 12TH AVE.
PORTLAND, OREGON 97201-3367
(503) 294-0442

JOSEPH R. MENDEZ
ALLAN F. KNAPPENBERGER

PETER MILLER
OF COUNSEL

FAX
(503) 294-4317

March 28, 1991

Jerry Offer
13125 S.W. Hall Blvd.
Planning Dept.
P.O. Box 23397
Tigard, Oregon 97223

Re: John and Florence Dolan
Site Development Review Application

Dear Mr. Offer:

Please find enclosed Applicant's Statement of Justification for Variance, Construction Cost Estimate and 15 copies of the site plans.

If you have any questions or concerns regarding the above, please feel free to contact me. Thank you for your cooperation and consideration in this matter.

Very truly yours,

KNAPPENBERGER & MENDEZ

/s/ Joseph R. Mendez
Joseph R. Mendez

JRM:sp
Enc.

STATEMENT OF JUSTIFICATION FOR VARIANCE

The variance requested by the applicant should be allowed as the conditions and dedications required by the City of Tigard violate the applicant's rights under the Oregon and United States Constitutions. Specifically, the City's demand for dedication constitute[s] an unlawful taking and violation of the Oregon Constitution, Article 1, Section 18 and the Fifth Amendment to the United States Constitution.

The proposed variance will not materially be detrimental to the purposes of the title nor conflict with the policy of the comprehensive plan as no park exists at this time nor does the City have sufficient funding in which to create a park that the bicycle/pedestrian path is theoretically going to be used to access.

There are special circumstances that exist which are peculiar to the lot in that the building which the applicant proposes to construct cannot be erected without invading the City's proposed bicycle/pedestrian path if the land is dedicated.

This hardship is not self-imposed but rather imposed by the City's dedication and the variance requested is the minimum variance which would alleviate the hardship to the applicant.

DATED this 26 day of March, 1991.

KNAPPENBERGER & MENDEZ

By: /s/ Joseph R. Mendez
JOSEPH R. MENDEZ,
OSB #82333
Attorney for Applicant

CONSTRUCTION COST ESTIMATE

Applicant states the construction cost estimate for the building on the site is $352,000.00. Said construction cost estimate is based upon a cost of $20.00 per square foot for the 17,600 square foot building to be constructed on the site.

KNAPPENBERGER & MENDEZ

By: /s/ Joseph R. Mendez
JOSEPH R. MENDEZ,
OSB #82333
Attorney for Applicant

* * *

PROPOSAL DESCRIPTION

FILE NO:SDR 91-0005/VAR 91-0010

FILE TITLE: Dolan/Mendez

APPLICANT: Knappenberger & Mendez
Attn: Joseph R. Mendez
1318 SW 12th Avenue
Portland, OR 97201

OWNER: John T. Dolan
Florence Dolan
1919 NW 19th Ave.
Portland, OR 97209

REQUEST, ZONE, LOCATION: Applicant requests Site Development Review approval to allow construction of an approximately 17,600 square foot retail sales building. Applicant also requests Variance approval to allow: 1) retention of area within the 100 year floodplain, and area adjacent to the floodplain for bike path construction

whereas the Community Development Code requires dedication of this area to the City; 2) retention of an existing roof sign on adjacent building whereas the Code requires removal of all roof signs. ZONE: CBD (Central Business District)

LOCATION: 12520 SW Main Street

(WCTM 2S1 2AC, tax lot 700)

COMPREHENSIVE PLAN DESIGNATION:
Central Business District

NPO NO: 1
NPO CHAIRPERSON: Ed Duffield
PHONE NUMBER: 620-8494

CHECK ALL WHICH APPLY:

		COMMENTS DUE BACK TO STAFF ON
X	STAFF DECISION	4/25/ 1991
_	PLANNING COMMISSION	DATE OF HEARING: _____ TIME: 7:30
_	HEARINGS OFFICER	DATE OF HEARING: _____ TIME: 7:00
_	CITY COUNCIL	DATE OF HEARING: _____ TIME: 7:30

REQUEST FOR COMMENTS AND ATTACHMENTS:

X	VICINITY MAP	X	LANDSCAPING PLAN
X	NARRATIVE	_	ARCHITECTURAL PLAN
X	SITE PLAN	_	OTHER:

PREPARE FOR PLANNER APPROVAL:

X ADVERTISEMENT - TIGARD TIMES ___
OREGONIAN _____

X NOTICE TO PROPERTY OWNERS TO BE MAILED _
_ LETTER OF ACCEPTANCE OF APPLICATION ___
_ NOTICE TO DLCD - ATTACHMENTS: _____
STAFF CONTACT: Ron Pomeroy

* * *

[LOGO]

CITY OF TIGARD, OREGON

SITE DEVELOPMENT REVIEW APPLICATION

CITY OF TIGARD, 13125 SW Hall, PO Box 23397
Tigard, Oregon 97223 - (503) 639-4171

1. GENERAL INFORMATION

PROPERTY ADDRESS/LOCATION 12520 S.W. Main Street, Tigard, Oregon

MAP AND TAX LOT NO. 2S1 ZAC, TAX LOT 700

SITE SIZE 1.67

PROPERTY OWNER/DEED HOLDER* John T. Dolan
Florence Dolan

ADDRESS 1919 N.W. 19th Ave. PHONE 225-9009

CITY Portland, Oregon ZIP 97209

APPLICANT* Attorney: Joseph R. Mendez

ADDRESS 1318 S.W. 12th Ave. PHONE 294-0442

CITY Portland, Oregon ZIP 97201

_____

* When the owner and the applicant are different people, the applicant must be the purchaser of record or a leasee in possession with written authorization from the owner or an agent of the owner with written authorization. The owner(s) must sign this application in the space provided on page two or submit a written authorization with this application.

2. PROPOSAL SUMMARY
The owners of record of the subject property request site development review approval to allow The construction of a 17,600 square foot building having a general retail sales facility

FOR STAFF USE ONLY

CASE NO. SDR 91-05

OTHER CASE NO'S: VAR 91-10

RECEIPT NO. 91-211 729

APPLICATION ACCEPTED BY: RP

DATE: 3-28-91

Application elements submitted:

X (A) Application form (1)
X (B) Owner's signature/written authorization
X (C) Title transfer instrument (1)
X (D) Assessor's map (1)
X (E) Plot plan (pre-app checklist)
X (F) Applicant's statement (pre-app checklist)
X (G) ~~List of property owners and addresses within 250 feet (1)~~
X (H) Filing fee ($315+8=$323)
X (I) Construction Cost Estimate

DATE DETERMINED TO BE COMPLETE:
4-5-91

FINAL DECISION DEADLINE: _____

COMP. PLAN/ZONE DESIGNATION:

CBD (PD) CENTRAL BUSINESS DIST.

N.P.O. Number: 1

Approval Date:

_____

Final Approval Date:

Planning _____

* * *

List any variance, conditional use, sensitive lands, or other land use actions to be considered as part of this application: See Attachment A.

Applicants: To have a complete application you will need to submit attachments described in the attached information sheet at the time you submit this application.

THE APPLICANT(S) SHALL CERTIFY THAT:

A. The above request does not violate any deed restrictions that may be attached to or imposed upon the subject property.

B. If the application is granted, the applicant will exercise the rights granted in accordance with the terms and subject to all the conditions and limitations of the approval.

C. All of the above statements and the statements in the plot plan, attachments, and exhibits transmitted herewith, are true; and the applicants so acknowledge that any permit issued, based on this application, may be revoked if it is found that any such statements are false.

The applicant has read the entire contents of the application, including the policies and criteria, and understands the requirements for approving or denying the application.

DATED this 18th day of March 1991

SIGNATURES of each owner (eg. husband and wife) of the subject property.

X /s/ John Dolan
JOHN DOLAN

_____

X /s/ Florence Dolan
FLORENCE DOLAN

_____

* * *

KNAPPENBERGER & MENDEZ
ATTORNEYS AT LAW
HONEYMAN HOUSE
1318 S.W. 12TH AVE.
PORTLAND, OREGON 97201-3367
(503) 294-0442

JOSEPH R. MENDEZ
ALLAN F. KNAPPENBERGER
PETER MILLER
OF COUNSEL

FAX
(503) 294-4317

March 12, 1991

Jerry Offer
13125 S.W. Hall Blvd.
Planning Dept.
P.O. Box 23397
Tigard, Oregon 97223

Re: John and Florence Dolan
Site Development Review Application

Dear Mr. Offer:

Please find enclosed herewith the Site Development Review Application, Applicant's Statement and Attachment A.

In the event there is any problem with either the variance documents, attachments or time limitations, please notify my office immediately.

Thank you for your cooperation and consideration in this matter.

Very truly yours,

KNAPPENBERGER & MENDEZ

/s/ Joseph R. Mendez
Joseph R. Mendez

JRM:sp
Enc.

cc: John Dolan

* * *

APPLICANT'S STATEMENT

The applicant is requesting variances with regard to the dedications required which comprise approximately 7,000 square feet or ten percent (10%) of the subject parcel. Variances regarding the dedication of all portions of the property below the elevation of 150 feet that fall within the existing 100 year floodplain and all property fifteen (15) feet above, to the east of 150 foot floodplain boundary which is intended to be used as a pedestrian/bike path. In addition, the City has inappropriately characterized an existing sign as a roof sign. The applicant requests that the wall sign not be required to be removed within the forty-five day period set forth in the Notice of Final Order by City Council which became final on February 5, 1990.

DATED this 18th day of March, 1991.

X /s/ John Dolan
JOHN DOLAN

X /s/ Florence Dolan
FLORENCE DOLAN

* * *

ATTACHMENT A

The property owner/deed holder is requesting approval of the variances listed below as consistent with section 18.134 *et seq.* of the code as follows:

1. Variance from the condition requiring dedication to the City as greenway all portions of the cite [sic] that fall within the existing 100 year floodplain (i.e. all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot flood plain boundary.

2. Variance from the condition requiring dedication of that portion of Petitioner's property for the purposes of a bike path.

3. Variance and the requirement that the "roof sign" that the owner/deed holder maintains is not a "roof sign" and should be accurately characterized as a "wall sign" be removed within 45 days of occupancy of the new building.

Supreme Court, U.S.
FILED
MAR 11 1994
OFFICE OF THE CLERK

37

No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

PETITIONER'S REPLY TO BRIEF FOR RESPONDENT

*David B. Smith
Dorothy S. Cofield
*Counsel of Record
Oregonians in Action
Legal Center
8255 S.W. Hunziker, Suite 200
P.O. Box 230637
Tigard, Oregon 97223
Telephone: (503) 620-0258

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Outright prohibition of the new store 5

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Dedication of a fee interest 7

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ARGUMENT

The City of Tigard, in its brief for respondent in No. 93-518, and the United States, in its *amicus curiae* brief in support of the city, contend the land use decision of the city afforded Mrs. Dolan sufficient benefits, and mitigated the burdens that were imposed on her, by the dedications that were imposed on her, to be sufficient to show she was not being "singled out in a manner so as to effect a compensable taking." Brief for United States at 27.

The city and the United States also contend the burden was on Mrs. Dolan, and not on the city, to show the requisite "nexus" between the "adverse" impacts of Mrs. Dolan's new store, and the requirement she dedicate 7000 square feet of her private, real property to the city. Both the city and the United States assert this Court's opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), does not allocate that burden to the city.

The city and *amicus* United States also argue this Court should give the city's dedication decision the same deference it accords the review of the constitutional validity of legislative and administrative decisions of local governments. Thus, they contend, heightened scrutiny of the nexus between development impacts and dedication conditions imposed by government is inappropriate.

All three contentions misstate the facts in the record and misapply this Court's precedents construing the Takings Clause of the Fifth and Fourteenth Amendments.

The facts of the case at bar, as shown in the record, establish Mrs. Dolan was singled out by the city in a manner that effects a Taking

The city, and its *amici*, argue that the city's imposition of dedications on Mrs. Dolan should not be held an unconstitutional taking by this Court because Mrs. Dolan's proposed new store will not suffer unjust and unfair burdens, but rather will impose burdens on the city and will receive various benefits from the city's imposed dedications. Thus, the dedications "imposed here . . . create[s] true 'reciprocity of advantage.' " Brief for Resp. at 41 (citing *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922)). In the city's view, the dedications are "likely [to] provide substantial value to Petitioner's property, rather than detract from it," Brief for Resp. at 41, because those dedications "reduce the hazards of flooding and enhance the general accessibility to the public of Petitioner's retail store." *Id*. However, the city overvalues the "benefits" conferred on Mrs. Dolan, underrates the burdens imposed on her by the dedications, and exaggerates the burdens her new store would impose on the city. There is no "reciprocity of advantage" that, in the absence of the city-demonstrated "essential nexus" required by *Nollan*, saves the city's decision from failing to substantially advance a legitimate state interest in violation of the Fifth and Fourteenth Amendments.

Mrs. Dolan's proposed new store will not unduly burden the city.

Payment of impact fees.

First, the city and the United States claim the payment of fees to mitigate impacts of Mrs. Dolan's development "have absolutely no bearing on the validity of the City's conditions [dedications] . . . and are used to fund programs at the discretion of those [other] governmental entitities [Washington County and the United Sewerage Agency]." Brief for Resp. at 45 n.33. *See also* Brief for United States at 20 n.14. In fact, exactly the opposite is the case. Those fees clearly do go to reduce burdens on the city.

The city, and the United States misrepresent how the $14,256.02 traffic impact fee to be assessed on Mrs. Dolan was to be used, contending it was to fund government programs of another government entity, Washington County. Brief for Resp. at 20 n.14. The record of the case at bar shows otherwise. Ordinance No. 90-65 clearly states that the city will "retain 100% of the proceeds" of assessed traffic impact fees. R., Doc. No. B, p. 161.

The record is silent as to the disposition of funds collected as the "fee in-lieu of water quality," Pet. App. G, pp. G-45, G-46. However, the record does indicate that this fee is assessed to avoid requiring on-site water treatment facilities that "could become a maintenance burden to the city." R., Doc. No. B, p. 108. Pet. App. G., p. G-14. Thus, even if this fee is to be paid to the United Sewerage Agency, as the city alleges, *See* Brief for Resp. at 45, n.33, it is clear that payment is specifically intended to avoid imposition of a burden on the city by the storm water

runoff from the proposed new store. Payment of the fee by Mrs. Dolan relieves the city of that burden.

The assertion of the United States that Mrs. Dolan failed to make arguments regarding the payment of the fees in the Oregon courts, "and she therefore failed to carry her burden," Brief for United States at 20 n.14, is without merit. Mrs. Dolan has always contended that the legal issue in this case was the constitutional propriety of the imposition of the dedication conditions on her by the city under the facts of this case, as shown in the record. The record shows the fees were imposed to mitigate traffic and stormwater runoff burdens of Mrs. Dolan's new stores.

Ultimately, the significance of the fees is that their assessment is directly based on the actual increase in square footage of Mrs. Dolan's new store over the existing facility. Pet. App. G, pp. G-15, G-45, G-46. Arguably, the underlying basis of those assessments makes those assessments directly proportional in both character and degree to the actual impacts of the increased size of the new store. Even though the city thus demonstrated the capacity to make such calculations, it found itself unable to base its dedication requirements on any analogous provisions, instead relying on mere hypotheses and conjecture.

Impacts of a "major modification."

Second, the city, and the United States, claim that Mrs. Dolan's new store was a "major modification" in use that would generate such grievous, adverse impacts on transportation and storm water runoff that the city could

have prohibited the development outright. Brief for Resp. at 22-23. Brief for United States at 11-12, 13 n.7. The city described the development as being akin to a "public nuisance." Brief for Resp. at 45. Both the city and the United States are mistaken.

The city's undisputed categorization of the new store as a "major modification" did not, in and of itself, establish that the categorization was a function of any adverse developmental impacts on either stormwater runoff or transportation. The city's code requires the city's planning director to designate development as a major modification whenever, *inter alia*, (1) an access driveway has been relocated, (2) a commercial building increases floor area by more than ten percent, or (3) a commercial building reduces the amount of open space on the parcel by more than ten percent. CDC § 18.120.070.B (reproduced in Brief for Resp. at App. B, p. B-40). None of those designation factors necessarily is based on any adverse impacts on either transportation or stormwater runoff. It cannot be said that it was any presumed adverse impact of Mrs. Dolan's new store that caused it to be a "major modification." To use that categorization as a basis for finding, *post hoc*, adverse impacts on the city, is mere hyperbole.

Outright prohibition of the new store.

Third, the city's and the United States' assertions that Mrs. Dolan's development was a "nuisance" and could have been prohibited outright are incorrect. The city claims it not only had the right to deny Mrs. Dolan's new store on the basis of transportation and storm water runoff impacts, but that Mrs. Dolan never claimed such a

denial would be a taking. It also contends, given that she never challenged the "factual correctness" of the city's findings on those impacts, "it is simply too late . . . to dispute those findings before this Court." Brief for Resp. at 34-35. *See also* Brief for United States at 11-12.

This Court held in *Nollan* that "a permit condition that serves the same legitimate police power purpose as a refusal to issue the permit should not be found a taking if the refusal to issue the permit would not constitute a taking." 483 U.S. at 836. In fact, the city never asserted that it could, or would, deny Mrs. Dolan's new store outright on the basis of either transportation or storm water runoff impacts. Instead, the city approved Mrs. Dolan's application, subject to the dedication conditions, concluding that "the proposed development, with modifications, will promote the general welfare of the City and will not be significantly detrimental nor injurious to surrounding land uses, provided development that occurs complies with applicable local state and federal laws." Pet. App. G-43. Given that approval, it is now the city which cannot assert, by *post hoc* rationalizations, that it could have denied the new store outright because its adverse impacts were a "nuisance."[1]

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[1] Assuming without agreeing that the city had the authority under state law and its zoning ordinance to prohibit the new store outright, this Court's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), suggests the city may still not have been able to prohibit the new store.

Addressing the question of whether the council's characterization of its prohibition of building on Mr. Lucas' two beachfront lots was to prevent harm, this Court noted it was "pointless to make the outcome of this case hang upon this terminology" because it was significant that the council's statute "permits owners of existing structures to remain." 120 L. Ed. 2d at 818 n.11. In the case at bar, the city's code does not require, and the city makes no assertion it does require, existing commercial structures of the same size and intensity of use to be removed because of their adverse specific or cumulative impacts upon transportation and stormwater runoff.

The city's decision does not relieve Mrs. Dolan of the burdens associated with dedicating 10% of her land to the city.

Dedication of a fee interest.

First, the city claims Mrs. Dolan was not required to dedicate a fee simple interest in 10% of her real property, but only to dedicate an easement. The city cites to its decision, reproduced at Appendix G, Petition for Certiorari, pp. G-43, G-44. Brief for Resp. at 47 n.34. A close reading of those pages of the decision's conclusions, and the city's findings and conclusions in general, fails to reveal any use of the term "easement," or any description of an "easement," in conjunction with the requirements for dedications of land for a greenway and pedestrian and bicycle pathway. The city's assertion the dedications involved only an easement, and therefore were somehow less onerous, is incorrect.[2] In fact, if only an easement was required of Mrs. Dolan to mitigate stormwater runoff

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[2] Even if the city had, in fact, only required dedication of an easement, it remains that the mandate of continuous public passage across the subject property will impose a serious unconstitutional burden on Mrs. Dolan. *See Nollan*, 483 U.S. at 832 ("a 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed").

and transportation impacts, then the city's use of that easement for recreational purposes becomes illegitimate, because recreational use would be justified only if fee simple had been granted. Although it is permissible to use property owned outright for uses unrelated to the basis on which it was acquired, it is not permissible to use an easement for such unrelated uses.[3]

Construction of the pathway.

Second, the city argues that Mrs. Dolan was only required to dedicate land for the pedestrian and bicycle pathway, and "no construction requirement is imposed." Brief for Resp. at 12-13 n.14. Mrs. Dolan has argued to this Court that she is being required to "construct the pedestrian and bicyclist pathway on the property she was required to dedicate to the city." Brief for Petitioner at 18. There is no question but that the city's decision contains express language that requires construction of the pathway. *See* Pet. App. G, p. G-28 ("The applicant will be . . . required to construct an 8 foot wide pedestrian/bicycle pathway in this area.").[4] City representations to the contrary are in error – the pathway will not be "built at

[3] *Compare* Brief for United States at 18-19 (arguing greenway and pathway easements may be used for purposes unrelated to traffic and storm water runoff problems because those dedications are analogous to traditional street and sidewalk fee simple dedications).

[4] On March 1, 1994, counsel for the city notified counsel for petitioner that the city previously had waived the requirement for construction of the pathway. That waiver was made during the city's decision on the Dolans' 1989 application for site development review, and, according to counsel for the city, is documented in the record of the governing body transmitted to the

public expense." Brief for Resp. at 42. Its contentions are without merit that such construction is not actually required because that finding is not restated in the portion at the end of the city's decision entitled "Conclusion and Recommendation," reproduced at Pet. App. G, pp. G-43 - G-47. *See* Brief for Resp. at 12 n.14.

Relief from other city-imposed burdens.

Third, the city contends its allowance of the property to be dedicated as an offset against open space set-aside requirements mandated for the proposed new store, together with relief from the requirement to survey the boundaries and to landscape the land to be dedicated to the public, confers benefits on Mrs. Dolan and mitigates the burden of the dedications. Brief for Resp. at 43 (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 137 (1978)). In effect, the city is arguing this Court should give the city credit for not penalizing Mrs. Dolan in her remaining use of the developable balance of her land, and

Oregon Land Use Board of Appeals by the city. Petitioner's appeal of the imposition of conditions in that decision was rejected by LUBA on ripeness grounds, *See* Pet. for Cert. at 3, Brief of Resp. at 3, and the Dolans in turn applied to the city for a variance. In that variance proceeding the city reinstated the pathway construction requirement. Pet. App. G, p. G-28. The city's decision on that variance application is the sole subject of the case at bar, and the record in the variance proceeding, which has been transmitted to this Court, does not include the record of the governing body in the 1989 application. In the end, the final land use decision of the city, which is the subject matter of the case at bar, clearly and unambiguously contains a finding that Mrs. Dolan "will be required to construct an 8 foot wide pedestrian/bicycle pathway . . . ." Pet. App. G, p. G-28.

for not compelling her to improve the city's property, after the city has imposed an uncompensated taking of that property on her. This is nothing more than the city avoiding "severance damages" to the remainder of Mrs. Dolan's parcel, and relieving her from the burden of providing public benefits it never should have imposed on her. It is hardly a benefit to her that the city was willing to minimize the damages inflicted on Mrs. Dolan after unfairly and unjustly severing 10% of her property, or to relieve her from surveying and landscaping land unfairly and unjustly taken from her.

The city's decision forcing Mrs. Dolan to dedicate 10% of her land to the city does not afford her with benefits.

Floodway improvements.

The city first asserts that city "floodway improvements will disproportionately benefit those like Petitioner who own property next to the floodplain." Brief for Resp. at 42. This is erroneous for two reasons. First, Mrs. Dolan's new store will not be erected in the 100-year floodplain. *See* J.A. at 3. Thus, there are no current flooding risks to form the basis for receipt of disproportionate benefits.

Second, even if there were such risks, the city's own comprehensive planning documents make clear Mrs. Dolan's property is only one of many properties that might derive benefits from floodway improvements. Discussing the reach of Fanno Creek south of Main Street, wherein Mrs. Dolan's property is located, the city determined "[t]he flood-plain width along this reach will vary

from 150 to 700 feet. Industrial, commercial, and residential structures on both sides of the stream will experience minor flood damages." Master Drainage Plan (R., Doc. No. F) at pp. 4-5. Thus, any benefits derived from city efforts at flood control will be enjoyed, not only by Mrs. Dolan, but by a large number of other Tigard landowners with property not adjacent to the creek but up to over 200 yards from Fanno Creek. But only Mrs. Dolan, and other owners with the misfortune to own land adjacent to the creek, will be unfairly and unjustly singled out to assume the floodway protection burden of dedicating land for the benefit of all the residential, commercial and industrial property owners within the flood range of Fanno Creek.

Pedestrian/bicycle pathway.

The city then contends Mrs. Dolan "will obtain significant advantages from the [pedestrian/bicycle] path . . . ." Brief for Resp. at 42. The city argues the pathway will act as a magnet to attract customers who are using the pathway for recreational purposes, and facilitate customer access by relieving traffic congestion in front of the store. However, there is no benefit to be derived from attracting recreational users of a pedestrian and bicycle pathway running alongside the store. The city's argument fails in the face of its own explicit findings.

The city granted Mrs. Dolan a reduction in the number of automobile parking spaces at the new store, agreeing with her characterization of her use as being similar to a "general retail sales, bulky merchandise use." Pet. App. G, p. G-32. She had characterized her use as

attracting "customers who decide in advance of travel that a product is needed and who travel to a specific destination to obtain that product." *Id.*

Finally, any benefits which Mrs. Dolan will derive from relief of traffic congestion by establishment of the pathway are exactly identical to the general benefits enjoyed by all of her neighboring business owners, both within and without the range of vision of the pathway, who are not required to dedicate any land to the city. Mrs. Dolan will receive no special benefits from establishment of the pathway. *See Norwood v. Baker*, 172 U.S. 269, 279 (1898) (government assessments on landowners are fair and just only if based on special benefits conferred on landowners).

This Court's decision in *Nollan* places the burden of showing the "essential nexus" on the city.

The constitutionality of the city's dedications at question in the instant case turns on the relationship between the government's justification for the dedications and the burdens that would be imposed on the public by Mrs. Dolan's proposed new store. This Court, in *Nollan*, recognized that the burden was on the government " 'to demonstrate a specific connection between provisions . . . [requiring dedications] and burdens on . . . [the public interests involved] . . . .' " 483 U.S. at 841 (quoting Brennan, J., dissenting). Thus, once Mrs. Dolan asserted that the city's dedications were a taking, it was the Fifth Amendment that imposed the burden of making that demonstration on the city. Nonetheless, the city argues that *Nollan* does not require that "the government must

prove the precise extent of those burdens and that it has precisely calibrated its response to those burdens." Brief for Resp. at 23.

Under the city's reading of *Nollan*, there is a presumption that a landowner has an obligation to dedicate property to the city unless the owner proves to the city's satisfaction that a variance should be granted. Requiring landowner proof of the negatives, that a proposed development would not adversely affect the environment and would cause no undue future liabilities for the city, is an impossible task. The city cannot defeat a takings claim by requiring a landowner to carry an unspecified burden of proof to establish undefined factors to the totally discretionary satisfaction of the very governmental agency which wants to take the land away from the owner without paying for it. The United States asserts that "consistent with the rule in constitutional litigation generally, the burden is on the person challenging the governmental action to establish a violation of the Takings Clause." Brief for United States at 9 (citing *Lucas*, 112 S. Ct. at 2893 n.6). Mrs. Dolan does not dispute that she has the burden of showing that the decision of the city violated the Takings Clause. It is undisputed that the city is demanding the dedication of 7000 square feet of her land, and has refused to compensate her for it. She has shown that and thus has met her burden of proof.

As *amicus* for the city 1000 Friends of Oregon, *et al.*, stated: "[A] land-use agency that fails to meet its initial burden of coming forward with evidence will no longer enjoy the ordinarily favorable assumptions about the factual basis for its decision." Brief for 1000 Friends at 27 (citations omitted). The city did not come forward with

evidence, notwithstanding its assertions that its comprehensive plan and its supporting documents established the necessary evidentiary support. *See* Brief for Resp. at 6-12. Those documents, however, merely attempt to validate the legitimacy of the city's state interest, and never relate any increase in square footage of development, increase in impervious surface, or vehicle trips per day, to requirements to dedicate measurable amounts of land, or interests therein. *See* R., Doc. No. F, pp. 8-10, 8-11. R., Doc. No. C, pp. 2-3. Those documents do not demonstrate the existence of the essential nexus required by *Nollan*. No attempt was made to establish that the unquantified effects asserted by the city to result from the enlarged building would justify denial of the permit in absence of the required dedication. "Simple common sense" that enlargement "will" lead to such effects, *See* Brief for United States at 19, is manifestly inadequate.

It was exactly that failure that Mrs. Dolan challenged at every level of review of the city's decision from the city's planning commission to this Court. Petitioner's Reply to Brief in Opp. at 3. And, as the dissent in the Oregon Supreme Court observed, "[t]he findings here [of the city] do not establish any cognizable remediable purpose attributable to the change in use." Pet. App. A, p. A-30 (Peterson, J., dissenting).

The City of Tigard, addressing Mrs. Dolan's proposed new store, utterly failed to demonstrate a specific connection between its dedications and the burdens of Mrs. Dolan's new store on the public interests involved. Its argument it should not have been required to shoulder the burden of making that demonstration is contrary to *Nollan* and should be rejected.

Heightened scrutiny of the nexus between development impacts and dedication conditions imposed by the city is appropriate because its decision is being challenged on an as-applied basis, and thus is not entitled to the same deference accorded legislative and administrative decisions.

There is no presumption of constitutionality that attaches to the city's decision to impose uncompensated dedications on Mrs. Dolan as conditions of approval for her new store. Mrs. Dolan has never facially challenged the constitutionality of the provisions of the city's comprehensive plan provisions and zoning ordinance that required her to dedicate 7000 square feet of her land to the city. She has, however, always contended those dedications, as applied, in the absence of the city's demonstration of the essential nexus required by *Nollan*, must be accompanied reciprocally by just compensation. Notwithstanding city assertions she never challenged the factual basis of the city's findings, Brief for Resp. at 26, she has, at every level of appeal, challenged the legal sufficiency of those findings under *Nollan*. And no compensation has been tendered.

The city argues: "The presumption of validity of legislative enactments is deeply rooted in this Court's jurisprudence." Brief for Resp. at 24 n.18 (citing *Brown v. Maryland*, 25 U.S (12 Wheat.) 419, 436 (1827)). However, the city never establishes that this Court has ever held that a city's decision not to pay for private property that it takes for public benefit is entitled to a presumption of validity in an as-applied constitutional challenge. The same deference that traditionally has been granted to facial challenges of both regulatory and legislative action

is not appropriate where the city itself, applying its legislation, is attempting to extract property interests for its own benefit. *See United States v. Good*, 62 U.S.L.W. 4013, 4017 (U.S. Dec. 13, 1993) (it is important to subject government actions to heightened scrutiny when government has direct financial interest in outcome of its decision).[5]

Indeed, deference should not be accorded where the city's justification for its dedications was merely a subterfuge. In the case at bar, the city made no findings in support of its contention that the dedications imposed on Mrs. Dolan were "carefully tailored to Petitioner's circumstances in many significant respects." Brief for Resp. at 45 (footnote omitted). The findings of the city found the dedications *reasonably related* to the new store, found it *reasonable to assume* and *reasonable to expect* the new store would have anticipated transportation impacts, and concluded the dedications *could* offset some of those impacts. Pet. App. G, p. G-24.

Instead, the city's code required dedication of land for a greenway and pedestrian pathway without regard to any impacts, adverse or otherwise. The city's comprehensive plan merely established the need for stormwater runoff protection and mitigation of transportation

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[5] Deference is even less appropriate where the constitutional challenge not only arises in an as-applied takings claim, but also where the decision upon which that claim is based is a quasi-judicial land use decision. The Oregon Supreme Court has held that a land use decision affecting a limited geographical area, such as the decision in the case at bar on an application for site development review and a variance on a single parcel, is a quasi-judicial rather than a legislative act. *Fasano v. Washington Co. Comm.*, 264 Or. 574, 581, 507 P.2d 23 (1973).

impacts. It never related those needs directly to measurable increases in the size or use of commercial structures.

The "reasonable" "expectations" and "anticipations" in the city's findings were nothing more "than an exercise in cleverness and imagination." *Nollan*, 483 U.S. at 841. If the city's decision is accorded the deference given to the facial review of legislation, the city's findings of even minimal effects become sufficient to justify the most substantial of exactions. A finding of even one additional vehicle trip per day from the new store could be used by the city to require Mrs. Dolan to repave all of the streets in the city because "it can be assumed her expansion will cause an increase in traffic, contributing to the need to resurface the streets." Brief for *Amicus Curiae* Northwest Legal Foundation at 12.

The United States argues "the Court has afforded governmental bodies considerable latitude to impose conditions reasonably related to the underlying program." Brief for United States at 21 (citations omitted). This would be true if the case at bar were merely an economic regulation case. But the city did not limit its actions to regulation alone (such as restricting development within the 100-year floodplain, or requiring setbacks from the boundary of that floodplain). It was the city's choice to go beyond the role of traditional regulation and demand dedication of Mrs. Dolan's land. That moved this case outside the precedents cited by the city and the United States related to economic regulation into the precedents based on the taking of property by government. Once the city decided to mix property acquisition into its regulatory actions, the more restrictive legal protections granted the owner of property which is subject to acquisition

must be met in addition to the less restrictive protections granted to the owner of property that is subject merely to regulation. The city must show a reasonably proportionate relationship, in both character and degree, and be subjected to heightened scrutiny, rather than being accorded the deference due facial review of economic regulation under the police power.

CONCLUSION

The city's argument in its Brief for Respondent, together with the brief for *amicus* United States, demonstrate that the standard employed by the city and urged on this Court, and the scrutiny (or lack thereof) employed by the Oregon courts, do nothing to protect individual landowners from being singled out to bear unfair burdens of providing property for proposed government projects.

The city contends if it adopts a plan to address a community-wide problem (*e.g.* traffic increases) and specifically identifies property needed to implement portions of that plan, the city may then demand all the property required (no matter how much of an individual parcel that may be) if any approval is requested by the property owner that would cause any contribution (no matter how small) to the identified problem. It makes no difference if the city takes a little for some other purpose (*e.g.* recreation). It makes no difference that the property owner also is paying a fee intended to fully mitigate its contribution to the problem. It makes no difference if other property owners making a similar contribution to the problem

are not required to dedicate the property (because the plan has not identified their property as needed).

In sum, the city's argument boils down to a claim that, as a condition of land use approval, it may exact any amount of property from an applicant and may use that property for any public purpose as long as the applicant's project will make some minimal contribution to some community problem and the property will be used in some minimal way to address that problem.

The United States at least recognizes the correct standard: "[I]f a permit condition is wholly out of proportion or fair relation to the proposed development and the circumstances of the property on which the condition is imposed, a question again would arise as to whether the measure actually has the purpose it ostensibly serves." Brief for United States at 26. On the facts of the case at bar, the city made no attempt to achieve any degree of proportionality because the city did not think it was necessary.

Petitioner, Florence Dolan, respectfully urges this Court to reject the city's *post hoc* rationalizations of its land use decision, and to hold the city violated the Fifth and Fourteenth Amendments by failing to demonstrate that the dedications it required of her were reasonably proportional, in both character and degree, to the specific

burdens her new store would impose on traffic and stormwater runoff.

DATED: March 10, 1994.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

FLORENCE DOLAN, PETITIONER

v.

CITY OF TIGARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the City of Tigard may, without payment of compensation, require a store owner to dedicate approximately ten percent of her land for a greenway for flood control and bicycle transportation as a condition of a permit to replace her store with a much larger store, where the dedication would mitigate the adverse effects of increased storm water runoff and traffic congestion caused by commercial development.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-518

FLORENCE DOLAN, PETITIONER

v.

CITY OF TIGARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns the constitutionality of a city's attempt to mitigate ill effects of urban growth through conditions imposed on permits to expand commercial development. The United States administers and funds many programs under federal statutes that further their regulatory objectives through conditions on the permit applicant's use of its property. See, *e.g.*, 33 C.F.R. 325.4(a) (in issuing permits under Section 404 of the Clean Water Act, 33 U.S.C. 1344, Army Corps of Engineers may impose conditions "directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable"). Some federal programs rely on permit conditions, including dedications of public access, to ensure that development projects do not impair environmental quality and other aspects of the public interest. See 33 C.F.R. 320.4(g)(3) and (o), 325.4(a) (Corps of Engineers permitting authority includes safeguarding public access to navigable waters); 36 C.F.R. 212.9(b) (Forest

Service may obtain easements for trails over non-federal lands "by purchase, condemnation, donation, or as a reciprocal for permits"); see also *United States* v. *Alaska*, 112 S. Ct. 1606 (1992) (discussing conditions, including waiver of property rights, on permits under Section 10 of Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1151).

In addition, federal statutes encourage local governments to develop comprehensive transportation plans utilizing bicycle and pedestrian facilities in order to reduce pollution. Under the 1990 Clean Air Act Amendments, "nonattainment" areas must prepare State Implementation Plans (SIPs) that demonstrate how air quality standards will be attained and maintained. 42 U.S.C. 7410; see 42 U.S.C. 7501-7515 (Supp. III 1991). Federally-assisted highway and transit projects (as well as major projects not receiving federal funds) cannot be approved unless they conform to the applicable SIP. 42 U.S.C. 7506(c). Transportation control measures that are likely to improve air quality in nonattainment areas are identified in 42 U.S.C. 7408(f)(1)(A). Subsections (ix), (x), (xiv), and (xv) all involve bicycle or pedestrian facilities. In addition, the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991), encourages local decisionmaking and development of nonpolluting forms of transportation. See, *e.g.*, 23 U.S.C. 134, 149.

STATEMENT

1. Petitioner owns a plumbing and electric supply store located on Main Street in the Central Business District of the City of Tigard, Oregon. The store occupies approximately 9700 sq. ft. on the eastern side of a 1.67-acre parcel (roughly 72,500 sq. ft.). Fanno Creek flows through the southwest corner of the lot and along its western boundary. The area within the creek's 100-year floodplain is virtually unusable for commercial development due to the year-round flow of the creek. Tigard's Comprehensive Plan designates the Fanno Creek floodplain to be included

as part of the city's greenway system. J.A. 3 (Site Plan Map); Pet. App. G8, G39.

Petitioner and her late husband applied to the city for a permit to engage in a multi-phase redevelopment of the site. Petitioner plans to build a 17,600 sq. ft. store on the southwestern side of the site, and to pave a 39-space parking lot. The existing building would be razed in sections corresponding to progress on the new building. In the second phase of development, petitioner proposes to build an additional structure on the northeastern side of the site for complementary businesses, and to provide more parking. The precise nature of this second phase has not been specified. Pet. App. G9, G31.

Petitioner's proposed expansion and intended uses are generally consistent with the zoning in the Central Business District. Owners of property in that District must comply with a 15% open space and landscaping requirement, which limits total site coverage (including all structures and paved parking) to 85% of the parcel. Pet. App. G16-G17. Petitioner's parcel also lies within an "Action Area Overlay Zone," which imposes an additional layer of zoning to implement the city's Comprehensive Plan for areas with a mixture of intensive land use. Those additional regulations are designed to provide for projected transportation and public facility needs in the Action Area. *Id.* at G17-G21. They include a requirement for the provision of "efficient, convenient and continuous pedestrian and bicycle transit circulation systems," as identified in the Comprehensive Plan. *Id.* at G18. Tigard adopted its land-use measures under state laws that require, among other things, conservation of open space, protection of streams, and development of a safe, multi-modal transportation system. *Id.* at H1-K1; Br. in Opp. App. B1-C13.

2. The city granted petitioner's permit application subject to certain conditions specified by the city's Community Development Code. which serves to implement the comprehensive plan. At issue in this case is a permit condition requiring petitioner to dedicate to the city an

area of approximately 7000 sq. ft., roughly 10% of the lot. Pet. App. G43. A portion of the dedicated land is in the Fanno Creek floodplain, and the remainder is a 15-foot-wide strip next to the floodplain to be used for a pedestrian/bicycle pathway. In accordance with city practice and at petitioner's request, the city determined that she may rely on the dedicated property to meet the 15% open space and landscaping requirement, and the city will bear the cost of maintaining a landscaped buffer between the dedicated area and the new store. *Id.* at G28-G29, G44-G45.[1]

The city's permit decision also requires petitioner to relocate the "footprint" of the new building outside the dedicated area to accommodate the pathway and a five-foot relocation of the floodplain bank by the city. Pet. App. G13, G28, G43-G44. Although the decision suggests that petitioner will be required to construct the pathway, *id.* at G28, the permit conditions themselves impose no such requirement, see *id.* at G43-G48. Petitioner must also pay a county-wide "traffic impact fee" for transportation improvements, and a "fee-in-lieu" of on-site water quality facilities, which will be used to purchase regional facilities to treat surface water runoff. *Id.* at G13-G15, G47-G48.

3. Petitioner sought a variance from the City Development Code provision that required the dedication, arguing that it effects an unconstitutional taking of property without compensation. Pet. App. G23. The City Council denied the variance, *id.* at G1-G3, based on findings and

[1] Petitioner asserts (Br. 11, 33 n.13) that the permit requires her to transfer a fee interest in the dedicated property. The language of the permit, however, requires only the dedication of the land "as Greenway" (Pet. App. G43), which presumably could be satisfied by an easement. The Community Development Code lists "[d]edication of easements" as a possible condition for site development permits. Br. in Opp. App. B16. The city's position, as we understand it, is that the condition here contemplates an easement rather than a fee interest. That view appears consistent with Oregon law. See *Portland Baseball Club* v. *City of Portland*, 18 P.2d 811, 812 (Ore. 1933).

conclusions set forth in a lengthy decision by the City Planning Commission, *id.* at G4-G48.

The Commission found the pathway portion of the dedication to be reasonably related to petitioner's proposal to intensify development, which would increase traffic and congestion on nearby collector and arterial streets. Pet. App. G24. The Commission noted that commercial expansion of a retail sales facility would be expected to generate a weekday average of 53.21 additional trips per 1000 square feet, or roughly 435 additional trips per day for petitioner's proposed expansion. *Id.* at G15. It further noted that the Comprehensive Plan specifically discusses the need for a pathway system to address traffic congestion. The Commission observed that "as the city grows, more people may rely on the pathways for utilitarian as well as recreational purposes." *Id.* at G25. The city previously had determined that traffic in the downtown area was so congested that it adversely affected emergency response, Tigard Area Comprehensive Pedestrian/Bicycle Pathway Plan, vol. 1, at 241-42, vol. 2, at 48, 54, and it had identified a pathway along Fanno Creek as a critical portion of the overall system. The city found that the plan will reduce hazards to pedestrians and bicyclists, provide children with safe access to schools, and otherwise reduce traffic congestion. *Ibid.*, Addendum (Tigard Res. No. 74). If traffic that would otherwise use the pathway is forced onto city streets, the Commission observed, "pedestrian and bicycle safety will be lessened." Pet. App. G27.

The city likewise found the floodplain portion of the dedication to be reasonably related to the expected increase in surface water runoff (Pet. App. G37, G40):

> The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to

> an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes.
>
> * * * * *
>
> [The planned] channel improvements, here and elsewhere along the creek, would be expected to improve the channel's ability to transmit stormwater flows thereby reducing the 100-year flood elevation and reducing the possibility of floodwater damages and threats to public safety.

The Commission specifically found that additional storm water runoff from commercial development at petitioner's site and elsewhere in the drainage basin will increase the flow within the Creek and adversely affect the 100-year flood elevation. Pet. App. G40. The city's Master Drainage Plan documents previous flooding along Fanno Creek (Drainage Plan at 2-7 to 2-8, 4-2 to 4-6, Figure 4.1), and notes that flood problems near Main Street are "extensive and severe." *Id.* at 4-5. The Comprehensive Plan describes the city's goals in regulating development in and adjacent to floodplains to avoid hazards to the public and downstream properties. Pet. App. G38. Based on information gathered from the U.S. Army Corps of Engineers, the Plan emphasizes the importance of retaining a vegetative buffer along streams and drainageways "to reduce runoff and flood damage and provide erosion and siltation control." *Id.* at J1. In furtherance of those goals, the Master Drainage Plan recommends improvements to Fanno Creek, including channel widening and slope stabilization, to increase flow efficiency and reduce the risk of flooding. *Id.* at G38-G39.

4. Petitioner appealed the city's variance denial, arguing that *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), requires a detailed demonstration by the city of a close nexus between anticipated adverse effects of the proposed expansion and the permit condition. The

state Land Use Board of Appeals (Pet. App. D1-D18), the Oregon Court of Appeals (*id.* at C1-C10), and the Supreme Court of Oregon (*id.* at A1-A30) rejected petitioner's constitutional challenge, finding the permit condition to be reasonably related to the proposed development.

SUMMARY OF ARGUMENT

1. The city's interests in alleviating traffic congestion and flooding are ample bases for land-use regulation. The city may consider the cumulative effects of development and need not demonstrate that petitioner's proposed expansion, standing alone, would have consequences sufficiently grave to require remediation. Given the scope of petitioner's proposed development, the city could reasonably conclude that its contribution to the city's overall traffic and drainage problems would be significant. The city could therefore have denied petitioner's permit application outright without effecting a compensable taking of property.

2. Under *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), even where a governmental body may deny a permit application entirely, it may not condition the grant of the permit on the relinquishment of a property interest if the exaction bears no reasonable relationship to the public need or burden to which the proposed development contributes. Unlike the exaction at issue in *Nollan*, however, the dedication requirement here is directly related to the projected impacts of petitioner's proposed expansion. Courts have uniformly upheld the requirement of street and sidewalk dedications as a condition of subdivision approval, recognizing that a constitutionally sufficient nexus exists between the expected increase in traffic resulting from a proposed development and the dedication of land for construction of additional transportation routes. Similarly, the requirement that petitioner dedicate an easement for drainage improvements bears an obvious relationship to the increased runoff anticipated from her enlarged store and paved parking lot.

The city need not demonstrate a precise mathematical fit between the exaction and the impact of the proposed development. The city may rely upon the cumulative impact of the type of activity proposed by petitioner, as well as the overall relationship of the exaction to petitioner's property and development. Here, the permit conditions, which further the same flood-control and transportation purposes as an outright prohibition would have done, "are not so clearly excessive as to belie their purported character." *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 (1989). Indeed, petitioner has not suggested an alternative, less intrusive condition that would adequately alleviate the burdens on traffic and drainage that the expansion of her business can be expected to cause.

3. Petitioner objects that non-floodplain property owners in downtown Tigard who propose significant commercial development will not be required to make dedications similar to that at issue here. Petitioner has failed to demonstrate, however, that she has been singled out in a manner that effects a compensable taking, since the conditions are tailored to the particular features of her property. The existence of a comprehensive, long-term city plan does not undermine the conclusion that the dedication required of petitioner is reasonably related to the impacts of her proposed development.

ARGUMENT

This Court's Takings Clause jurisprudence represents an effort to strike an appropriate balance between competing considerations. On the one hand, "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 835-836 n.4 (1987) (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). On the other hand, regulation of economic affairs is pervasive; virtually all such regulation adversely affects some

members of the community; and "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 (1992) (quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922)).

"Given the propriety of the governmental power to regulate, it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another," *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986), or that every diminution in property values caused by governmental action constitutes a compensable taking. Persons who believe that their economic interests have been unfairly slighted must ordinarily seek redress through the political process. This Court's decisions thus have sought to identify those instances in which the costs of government are *so* unfairly concentrated on particular persons as to require compensation. And, consistent with the rule in constitutional litigation generally, the burden is on the person challenging the governmental action to establish a violation of the Takings Clause. See, *e.g.*, *Lucas*, 112 S. Ct. at 2893 n.6.

Although the Court has "generally eschewed any set formula for determining how far is too far, preferring to engage in essentially ad hoc, factual inquiries," *Lucas*, 112 S. Ct. at 2893 (internal quotation marks, brackets, and ellipsis omitted), it has "described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Ibid.* Governmental action is generally regarded as a per se taking if it effects a "permanent physical occupation" of private property, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-440 (1982); *Nollan*, 483 U.S. at 831-832, or denies the owner all economically beneficial use of land that is consistent with applicable nuisance law and comparable principles. *Lucas*, 112 S. Ct. at 2893-2895. The Court has

also stated that land-use regulation that does not effect a physical invasion of property or deprive its owner of all beneficial use will nonetheless constitute a taking if it "does not substantially advance legitimate state interests." *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980).

In *Nollan* this Court held that the government's appropriation of a public easement across privately owned land would ordinarily constitute a "permanent physical occupation" of property and thus a compensable taking. 483 U.S. at 831. The Court also made clear, however, that under some circumstances, a governmental entity may require a landowner to furnish such an easement, without compensation, as a condition of a land-use permit. *Id.* at 836. Such a condition may validly be imposed, the Court held, if (1) the nature of the proposed use is such that the government's outright denial of the permit would not have effected a taking, *ibid.*, and (2) "the permit condition serves the same governmental purpose as the [hypothetical] development ban." *Id.* at 837.[2] The development condition in the present case satisfies both these requirements.

I. THE CITY OF TIGARD CONSTITUTIONALLY COULD HAVE CHOSEN TO REJECT PETITIONER'S DEVELOPMENT PROPOSAL BASED ON ITS ANTICIPATED CONTRIBUTIONS TO THE CITY'S TRAFFIC AND DRAINAGE PROBLEMS

Petitioner devotes the bulk of her brief to the contention that there is not a sufficient nexus between the permit condition and her proposed development. She also appears to contend, however, that an outright denial of her permit

[2] The Court explained that the government's "power to forbid construction * * * must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." 483 U.S. at 836. Because that test is satisfied in this case, there is no need to consider the circumstances under which conditions may validly be imposed even if the permit could not be denied outright without payment of compensation.

application would have effected a compensable taking. See, *e.g.*, Pet. Br. 23, 32.[3] Petitioner does not argue that the denial would have amounted to a physical invasion of her property; nor does she assert that the proposed expansion of her store is necessary to allow the use of her land in an economically beneficial manner.[4] Rather, petitioner questions whether denial of her permit would have "substantially advanced" any legitimate governmental interest. Petitioner's argument is without merit.

A. A broad range of governmental purposes—including scenic zoning, landmark preservation, and residential zoning—constitute "legitimate state interests" under the Takings Clause. *Nollan*, 483 U.S. at 835 (citing cases). In light of the extensive studies and analysis that support Tigard's Master Drainage Plan and Comprehensive Community Code—which document the burden imposed on the Fanno Creek floodplain by extensive commercial development—it cannot be seriously doubted that a denial of development permits for parcels adjacent to Fanno Creek would be reasonably related to flood protection. See *Pope* v. *City of Atlanta*, 249 S.E.2d 16, 19-20 (Ga. 1978) (city plan limiting impervious structures in floodplain does not effect a taking), cert. denied, 440 U.S. 936 (1979); *Maple Leaf*

[3] Indeed, it might be said that in substance this is petitioner's *primary* argument. Petitioner asserts (Br. 19) that *Nollan* involved "facts analogous to the facts of the instant case," and claims (Br. 23) that "the city did not demonstrate the existence of the essential nexus required by *Nollan*." She makes no real effort to argue, however, that the consideration that proved decisive in *Nollan* has any application to the present case. She does not contend, that is, that the exaction is logically unrelated to the problems that will be caused by her development. Her argument is instead that the proposed development will not cause traffic and drainage problems in the first place.

[4] If such a challenge were made, the inquiry would focus on the potential for economically viable use of the tract as a whole, not on the portion precluded from further development. See *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2290 (1993); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 130-131 (1978) (same).

Inv., Inc. v. *Department of Ecology*, 565 P.2d 1162, 1164-1166 (Wash. 1977) (ordinance limiting development in floodway does not effect a taking). Likewise, the city's comprehensive pathway plan establishes that downtown Tigard is plagued by serious traffic congestion spawned by commercial development and other urban growth. Denial of permission to engage in further significant development would advance the legitimate governmental interest in providing for a safe and efficient transportation system. *Agins*, 447 U.S. at 260-263 (zoning that curbs development to address ill effects of urbanization does not effect a taking); *Euclid* v. *Ambler Co.*, 272 U.S. 365, 394-395 (1926) (same). Petitioner would benefit from a moratorium on commercial development in Tigard as a result of reduced flood risks and traffic congestion, and she would thus enjoy a reciprocity of advantage that would further weigh against a finding of a taking. See *Lucas*, 112 S. Ct. at 2894; *Agins*, 447 U.S. at 262; *Mahon*, 260 U.S. at 415.[5]

[5] This Court has stated that takings analysis "entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980); see, *e.g.*, *Concrete Pipe*, 113 S. Ct. at 2290-2292. The first two of these factors have been made the subject of categorical treatment: governmental action generally is a per se taking if its "character" is that of a permanent physical occupation of real property or if its "economic impact" is to deprive the owner of all beneficial use of his land that is inconsistent with applicable nuisance law and comparable principles. Outright denial of a permit application would not have effected a taking under either of those two tests. It instead would have constituted an exercise of traditional land-use regulation that allowed petitioner to maintain her ongoing commercial use of the property. See *Concrete Pipe*, 113 S. Ct. at 2291. Nor has petitioner shown that prohibition of her proposed construction would have impermissibly "interfere[d] with reasonable investment-backed expectations." The power of governmental bodies to limit development in order to prevent traffic congestion or decrease the risk of flooding is well-established, and this is not a case in which a sudden change in the City's regulatory standards has undermined genuine reliance interests or otherwise subjected petitioner to unfair surprise. Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005-1014 (1984).

B. Petitioner does not contest the legitimacy of the city's interests in flood and traffic control. She contends instead that the city has failed to demonstrate a significant connection between her own development proposal and the problems affecting the community. It is well established, however, that governmental bodies may legitimately fashion comprehensive plans designed to deal with the cumulative effects of development throughout a given geographic area. The propriety of the density restrictions at issue in *Agins*, or of the residential zoning challenged in *Euclid*, did not depend upon a showing that nonconforming development on a single tract would substantially alter the character of the surrounding neighborhood.[6] And the Court in *Nollan* observed that "the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede [legitimate governmental] purposes." 483 U.S. at 835-836. The city in this case therefore properly considered whether the proposed expansion of petitioner's store, in conjunction with other development, could be expected to exacerbate the community's traffic and drainage problems.[7]

[6] Indeed, the Court in *Euclid* observed that "the coming of one apartment house is followed by others" and emphasized the cumulative effects of this form of development. 272 U.S. at 394.

[7] Petitioner argues (Br. 27) that "[t]he city's code required dedication of land for a greenway and pedestrian pathway without regard to any impacts, adverse or otherwise, of the development." The City 's site development review process applies, however, only to "new developments and major modifications of existing developments," Br. in Opp. App. B1; a lesser expansion of petitioner's store therefore would not have triggered dedication requirements. Petitioner was also given an opportunity through the variance process to demonstrate that the impacts of her proposed development would be insubstantial. Cf. *Williamson Planning Comm 'n* v. *Hamilton Bank*, 473 U.S. 172, 191

Petitioner's proposed expansion would nearly double the size of her store and add a 39-space paved parking lot. Petitioner also proposes a significant future development for complementary businesses and additional parking that will substantially increase the impervious surface area of the parcel. Pet. App. G9, G31. In denying petitioner's request for a variance, the city found that this proposal would "increase the amount of storm water runoff from the site to Fanno Creek" and that "[t]he Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation." *Id.* at G37. The city reasonably concluded that the increased stormwater runoff from proposed development "to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes." *Ibid.* The Planning Commission noted as well that commercial expansion of a retail sales facility would be expected to generate a weekday average of 53.21 additional trips per 1000 square feet, or (in the case of petitioner's proposed development) roughly 435 additional trips per day. *Id.* at G15.

These findings establish that commercial growth has had a cumulative and serious adverse impact on the Fanno Creek drainage basin, and that petitioner's proposed development would further burden the floodplain. In addition, the Commission's findings amply support its conclusion that "the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets." Pet. App. G24. Accordingly, consistent with the Constitution, the city might simply have denied petitioner's application for a development permit.

(1985) (takings claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question").

II. THE DEDICATION REQUIRED AS A CONDITION OF THE PERMIT IS REASONABLY FASHIONED TO ADDRESS THE PROPOSED DEVELOPMENT

Because the city could have denied petitioner a permit to engage in significant commercial expansion, it may also grant petitioner a permit subject to conditions that have a suitable nexus to the proposed development.

A. 1. The *Nollan* Court observed that "the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." 483 U.S. at 836. It determined, however, that the Coastal Commission could not constitutionally require an uncompensated easement along the beach on the Nollans' property because such an easement would do nothing to mitigate the visual and psychological barrier between the road and the beach that would be exacerbated by the Nollans' new house. The flaw was not that the required easement was unnecessarily large, or that the Nollans' contribution to the overall adverse impact of beachfront development was too small, but that the character of the permit condition was disconnected from the adverse effect of the proposed development. The Court concluded that the "evident constitutional propriety" of a permit condition disappears "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. The Court explained that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use, but an 'out-and-out plan of extortion.'" *Ibid.* (citation omitted).

The Court in *Nollan* found this relatedness requirement to be reflected in a substantial body of takings jurisprudence. 483 U.S. at 839-840 (citing cases). It also finds support in analogous settings. The Court has recognized that receipt of government benefits, par-

ticipation in government programs, permission to use government facilities, or freedom from governmentally imposed burdens (*e.g.*, taxation) may be conditioned upon compliance with requirements that the government could not impose unilaterally. The Court has consistently required, however, that if the condition is to be valid, there must exist some nexus between the condition and the purposes of the underlying government program.

Thus, "the government's power as an employer to make hiring and firing decisions on the basis of what its employees * * * say has a much greater scope than its power to regulate expression by the general public." *Rankin* v. *McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting) (citing *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968)). Such decisions must be justified, however, by reference to the government's interests *as an employer*, see *Pickering*, 391 U.S. at 568; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 101 (1947); the government may not use the employment relationship as leverage to evade constitutional restrictions in its pursuit of goals that are unconnected to that relationship. Similarly, Congress, in exercising its spending power, may condition receipt of federal funds on compliance with conditions that could not be imposed directly, see *South Dakota* v. *Dole*, 483 U.S. 203, 206-207 (1987), so long as those conditions serve to further the purposes for which the funds are spent. *Id.* at 207-209; *id.* at 213-214 (O'Connor, J., dissenting); *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 285 (1958); see also *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 591 (1937);[8] *Stephenson* v. *Binford*, 287 U.S. 251, 274-275 (1932) (sustaining state regulation of trucking rates and distinguishing prior case invalidating a state scheme that "was in no real sense a regulation of the use of the public highways," but instead had "furnished a purely unrelated occasion for imposing the unconstitutional condition").[9]

[8] In *Steward Machine*, the Court sustained federal tax credits for employer contributions to state unemployment compensation funds meeting federal statutory prerequisites, explaining (301 U.S. at 591):

> It is one thing to impose a [federal] tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national. * * * It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents.

2. The permit condition in this case is directly related to the adverse effects of commercial development like petitioner's proposed expansion, and accordingly serves the same purposes as outright denial of the permit would have served. As a result, the regulatory scheme, including the permit condition, is exactly what it purports to be—"a valid regulation of land use"—not a means of "extortion." *Nollan*, 483 U.S. at 837.

The greenway dedication will allow the city to make necessary improvements in the floodplain, provide for an alternate transportation route, and prevent use of the specified area in a manner inconsistent with the city's public-safety goals. There is a reasonable connection between the nature of the required dedication and the governmental interests to be served. Indeed, street and sidewalk dedication requirements imposed as conditions to residential subdivision approval constitute the *prototypical* development exactions, against which the propriety of other exactions is commonly measured. "[Z]oning regulations requiring subdividers * * * to

[9] See generally Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1458-1468 (1989); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321, 350-352 (1935). Several commentators have analyzed *Nollan* within the framework of the Court's "unconstitutional conditions" cases. See, *e.g.*, Sullivan, 102 Harv. L. Rev. at 1463-1464; Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1610 n.51 (1988); Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 34-37. See also *Parks* v. *Watson*, 716 F.2d 646, 650-653 (9th Cir. 1983) (analyzing propriety of development permit condition by reference to unconstitutional conditions jurisprudence).

dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion." *Pennell* v. *San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part).[10] The courts have thus consistently recognized that a constitutionally sufficient nexus exists between a proposed development that can be expected to generate traffic and the dedication of land for construction of additional transportation routes.[11] The pathway dedication at issue here fits comfortably within that tradition.[12]

The fact that the greenway dedication may serve governmental purposes in addition to alleviation of flooding and traffic congestion does not invalidate the otherwise sufficient nexus. Members of the public might stop to rest

[10] See also Berger, *Conscripting Private Resources to Meet Urban Needs: The Statutory and Constitutional Validity of Affordable Housing Impact Fees in New York*, 20 Fordham Urban L. J. 911, 914-915 (1993) (street and sidewalk dedications are commonly accepted as consistent with the Takings Clause); Powell, *Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack*, 39 DePaul L. Rev. 635, 639 (1990) (same); Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L. J. 1119, 1132 (1964) ("Judicial reaction uniformly has been that the imposition of street dedication and improvement conditions does not constitute a taking").

[11] See also *Leroy Land Dev.* v. *Tahoe Regional Planning Agency*, 939 F.2d 696, 699 (9th Cir. 1991) (permit conditions compelling acquisition of land for open space and other off-site mitigation have sufficient nexus to erosion control under *Nollan* because developed property's impervious surfaces aggravate erosion).

[12] The city has concluded that creation of a safe and convenient pedestrian and bicycle pathway system as an alternate means of transportation could offset some of the traffic demand caused by development in the central business district. That conclusion is plainly reasonable and is in accord with the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914, and the 1990 Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399, which recognize pedestrian and bicycle facilities as necessary components of any strategy to reduce traffic congestion and air pollution. *E.g.*, 42 U.S.C. 7408(f)(1)(A)(ix)-(x) and (xiv)-(xv); 23 U.S.C. 149, 217.

on the dedicated property and make other incidental use thereof. Although it is unclear whether the physical characteristics of the property would invite such use, the permit condition would presumably allow for it. And to the extent that the pathway is utilized for recreational activities by persons who would not, in its absence, be driving automobiles or riding bicycles on nearby streets, it will serve purposes beyond alleviation of the city's traffic problems and related safety concerns associated with bicycles in the commercial district. But just as the Takings Clause is not a mere "pleading requirement," *Nollan*, 483 U.S. at 841, neither is it a model land-use code to be used to flyspeck development permits. Street and sidewalk dedications imposed as conditions to residential subdivision approval to alleviate congestion are commonly accepted as consistent with the Takings Clause, see pp. 17-18, *supra*, even though streets and sidewalks are available (as a matter both of practice and of constitutional law) for purposes having nothing to do with alleviating traffic burdens or promoting safety.[13] Similarly, the requirement that States establish a higher drinking age undoubtedly serves ends other than increasing the safety of federally funded highways, yet the Court held it to be "directly related," *South Dakota* v. *Dole*, 483 U.S. at 208, to the effectuation of that governmental purpose.

In short, the record demonstrates that the city's justifications for the permit conditions are not a subterfuge. It is not "an exercise in cleverness and imagination," *Nollan*, 483 U.S. at 841, but simple common sense, to conclude that greatly expanded commercial development like that proposed by petitioner will lead to increased storm water runoff and traffic congestion. And the city's

[13] See, *e.g.*, *Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939) (plurality opinion) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."); *United States* v. *Grace*, 461 U.S. 171, 177 (1983).

explanation of its attempt to address those serious problems is not an empty articulation to fulfill a "pleading requirement," *ibid.*, but instead the very essence of workaday municipal planning.[14]

B. 1. Petitioner nevertheless contends that the permit condition is unconstitutional. In her view, *Nollan* requires that permit conditions be subjected to "heightened scrutiny" (Br. 30), and that they can be justified only upon a factual showing by the government that they have a "substantial" nexus (and are "proportionate") to the specific (and "quantifiable") incremental harms that are directly attributable to the proposed development. See generally Resp. Br. 19-29. That contention finds no support in *Nollan* itself. There, the Court accepted, for purposes of discussion, the Coastal Commission's test of how close a "fit" is required—namely, whether the condition "is reasonably related to the public need or burden that the [proposed development] creates or to which it contributes"—because the Court found that the

[14] Petitioner also contends (Br. 18, 24) that the dedication condition is improper because it duplicates monetary assessments that respond to the same impacts of the proposed expansion. See Pet. App. G14-G15. If the monetary exactions were intended as full recompense by the property owner for the full public costs and consequences of its development, the legitimacy of the challenged permit condition as a valid land-use regulation might well be called into question. Cf. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 162 (1980) (county's appropriation of interest earned on private interpleader fund was a taking; interest could not be regarded as a fee for government services, since "any services obligation to the county was paid for and satisfied by the substantial fee charged pursuant to" a separate statutory provision). Petitioner raised that issue for the first time in this Court, however, and she therefore failed to carry her burden of establishing that the fees—imposed, it should be noted, by governmental bodies other than the city, see Pet. App. G14—were intended to constitute a fully sufficient means of addressing the same impacts that are addressed by the dedication condition.

condition in *Nollan* did not meet "even the most untailored standards." 483 U.S. at 838.[15]

Significantly, moreover, the Court has eschewed the sort of heightened scrutiny advocated by petitioner in the analogous contexts discussed above. See pp. 16-17, *supra*. Thus, although the administration of a government program may not be employed as a subterfuge for imposing otherwise unconstitutional conditions having "no relation," *Stephenson*, 287 U.S. at 275, to the purposes of the underlying regulatory scheme, the Court has not required that the condition imposed be the best or only method of achieving the government's legitimate purposes, or that it be narrowly tailored or directly proportionate to harms specifically attributable to the person affected by the program. Rather, the Court has afforded governmental bodies considerable latitude to impose conditions reasonably related to the underlying program. See *Mitchell*, 330 U.S. at 101 (federal employees may be barred from political activity "reasonably deemed by Congress to interfere with the efficiency of the public service"); *South Dakota* v. *Dole*, 483 U.S. at 208-209 ("the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel"); *Ivanhoe Irrigation Dist.*, 357 U.S. at 285 ("reasonable conditions relevant to the federal interest in the project and to the over-all objectives thereof"); *Steward Machine Co.*, 301 U.S. at 591 (condition improper if "unrelated" to fiscal need served by tax or to other legitimate goal); *Stephenson*, 287 U.S. at 274-275 (measure invalid where its purported regulatory purpose "furnished

[15] The Court in *Nollan* also stated that so long as the permit might have been denied entirely, it could have been granted subject to the condition that the Nollans "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." 483 U.S. at 836. That unqualified statement suggests that the Court viewed the nexus requirement primarily as one of logical relatedness that entails no fine comparisons between the extent of a project's impacts and the intrusiveness of the permit condition.

a purely unrelated occasion for imposing the unconstitutional condition"); see also *Nashville, C. & St. L. Ry.* v. *Waters*, 294 U.S. 405, 429 (1935) ("some reasonable relation to the evils to be eradicated").[16]

2. In urging some version of heightened scrutiny, petitioner places considerable emphasis on the Court's observation in *Nollan* that land-use regulation must "substantially advance" legitimate governmental interests. 483 U.S. at 834, 841; see Pet. Br. 20-21.[17] Petitioner errs in several respects.

First, the question whether the city's actions "substantially advance" legitimate governmental interests must be addressed in the context of the regulatory scheme as a whole. As we have explained above (see pp. 11-12, *supra*), the city's comprehensive plans and codes substantially advance its legitimate interests in flood and traffic control. The city constitutionally could have denied a permit altogether under those provisions, because petitioner's proposed development was expected to increase water runoff and traffic congestion. Thus, to the extent "substantial advance[ment]" is independently necessary with respect to each application of the city's general codes, that standard would have been met here by an outright denial of a permit. It should follow that if the dedication condition included in the permit meaningfully "serves the same governmental purpose" and "further[s]

[16] See also *Parks* v. *Watson*, 716 F.2d at 652 ("Both case authority and scholarly commentary indicate that a condition requiring an applicant for a governmental benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred.").

[17] Petitioner also repeatedly recites (Br. 20, 22, 30) the Court's reference in *Nollan* to the "essential nexus" between the purpose served by the condition and the purpose served by a prohibition against development. See 483 U.S. at 837. That phrase in *Nollan*, however, merely served to emphasize that the *existence* of such a nexus is necessary; it did not suggest that the condition (or prohibition) itself must be "essential," in the sense of serving some compelling governmental interest.

the [same] end" (*Nollan*, 483 U.S. at 837) as an outright denial of a permit, then the regulatory scheme continues to "substantially advance" legitimate governmental interests as applied to her property in the form of a permit condition. Contrary to petitioner's further contention (Br. 24), the Fifth Amendment does not impose the burden of proof on a government agency to justify each application of its regulatory scheme to a particular parcel (whether in the form of a permit denial or a permit condition). See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 487 n.16 (1987).

Second, it does not appear that the Court has used the word "substantial" in this setting in a manner that is distinct in substance from "reasonable." As a historical matter, this Court's decisions regarding land-use restrictions have employed the word "substantial" to mean "not insubstantial," "not illusory," or "more than negligible." Cf. *Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1912-1913 (1992) (discussing "substantial nexus" test under Commerce Clause).[18] In *Nectow* v. *Cambridge*, 277 U.S. 183 (1928), for example, the Court stated that "a court should not set aside the determination of public officers in such a matter unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Id.* at 187-188 (quoting *Euclid* v. *Ambler Co.*, 272 U.S. at 395);[19] see also *Lucas*, 112

[18] *Nollan* itself suggests that the two words are largely interchangeable in this setting. Thus, after quoting *Agins* for the proposition that a land-use measure does not effect a taking if it "substantially advances legitimate state interests" (447 U.S. at 260), the Court quoted the observation in *Penn Central* (438 U.S. at 127) that a use restriction may constitute a taking "if not reasonably necessary to the effectuation of a substantial governmental purpose." See 483 U.S. at 834.

[19] *Nollan* suggested that a land-use regulation that satisfies due process or equal protection standards because "the State '*could rationally have decided*' that the measure adopted might achieve the

S. Ct. at 2897 (quoting *Penn Central*, 438 U.S. at 125 ("where State 'reasonably concludes that health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land,' compensation need not accompany prohibition").[20]

State's objective" (quoting *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)) might nevertheless be invalid under the Takings Clause because it fails to "substantially advance" a legitimate state purpose (quoting *Agins*, 447 U.S. at 260). 483 U.S. at 834-835 n.3. Other decisions suggest, however, that the due process and takings standards are essentially the same in this respect (although, under *Lucas*, the Takings Clause of course requires a further inquiry into economic impact). *Agins*' observation that land-use regulation "effects a taking if the ordinance does not substantially advance legitimate state interests," 447 U.S. at 260, was supported by citation to *Nectow*. But *Nectow* involved a due process challenge rather than a takings claim, 277 U.S. at 185, and, as noted in the text, the Court in *Nectow* used the phrase "substantial relation" in contradistinction to "a mere arbitrary or irrational exercise of power." And since *Nollan*, the Court has reiterated that where "due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violated the Takings Clause." *Concrete Pipe*, 113 S. Ct. at 2289 (quoting *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986)).

There is no need in this case, however, to determine what differences there may be between the Due Process and Takings Clause standards in this respect. The Oregon Supreme Court held that the permit condition was "reasonably related" to petitioner's proposed development, Pet. App. A13-A16, not merely that the city had satisfied what footnote 3 of *Nollan* suggests might be a more relaxed standard of whether the city "rationally could have believed" that there was a nexus between the condition and the development. Whether the appropriate nexus is expressed as a "reasonable" or substantial" relationship may not be important so long as it is clear that the sort of heightened scrutiny petitioner urges is not required and that judicial review of legislative and administrative determinations in this setting involves a significant degree of deference. Cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-416 (1971). In our view, the word "reasonable" more aptly captures these principles.

[20] In some contexts other than land-use regulation, however, the Court has sometimes employed the word "substantial" to make clear that the Constitution requires a more demanding test than rational-basis review. See, *e.g.*, *Craig* v. *Boren*, 429 U.S. 190, 197 (1976)

Thus, the requirement of a nexus between a permit condition and a permit denial does not serve to introduce into the permit condition context new principles that are not present in other areas of takings jurisprudence— such as a requirement of heightened justification, proportionality or equivalence of benefit and burden, and a shifting to the government of the burden of proof. See, *e.g.*, *Penn Central*, 438 U.S. at 125-128. As this Court has said, "the Just Compensation Clause 'has never been read to require the . . . courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received' in determining whether a 'taking' has occurred." *Sperry*, 493 U.S. at 61 n.7 (quoting *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 n.21 (1987)).[21] The nexus requirement serves, rather, to ensure that the statutory scheme actually constitutes valid land-use regulation (rather than an occasion for obtaining an unrelated exaction), and thereby to identify and invalidate measures that are "in no real sense a regulation of the use of [land]." *Stephenson*, 287 U.S. at 275; see *Nollan*, 483 U.S. at 837 & n.5, 839, 841.

("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 272-273 (1979) (contrasting standard of review for gender-based classifications with ordinary rational-basis review); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) ("The State must assert a substantial interest to be achieved by restrictions on commercial speech."); see also *Amicus* Br. American Farm Bureau Federation, et al. at 26-27. This Court has not suggested that restrictions on the use of land are plausibly analogized to gender-based classifications or to restrictions on commercial speech.

[21] In many cases, the anticipated harms (both immediate and long-term) of development cannot be readily or precisely quantified, and it is therefore necessary to build in a measure of protection against the risk of future harm. The Fifth Amendment does not require the public, rather than the landowner whose development would alter the status quo, to assume that risk and its associated costs; nor does it prevent governmental agencies from exercising their expert predictive judgment about the consequences of proposed development.

This is not to say that concepts of proportionality or the degree of relatedness are irrelevant in this setting. For if a permit condition is wholly out of proportion or fair relation to the proposed development and the circumstances of the property on which the condition is imposed, a question again would arise as to whether the measure actually has the purpose it ostensibly serves. Here, however, the permit conditions adopted by the city "are not so clearly excessive as to belie their purported character." *Sperry*, 493 U.S. at 62; see *id.* at 62 n.8; cf. *Pittsburgh* v. *ALCO Parking Corp.*, 417 U.S. 369, 375-376 (1974); *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 253 (1987). The record amply supports the city's conclusion regarding the likely impacts of petitioner's proposed development and petitioner did not invoke applicable administrative procedures to proffer any contrary evidence or to show that the permit condition bears no reasonable relationship to her proposed development. See pp. 13-14, *supra*. The required dedication was reasonably fashioned to address those impacts and was measured by the extent of floodplain on petitioner's property. Compare *Hancock* v. *City of Muskogee*, 250 U.S. 454, 459 (1919); cf. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 625-629 (1981).[22] Petitioner has not suggested an alternative, less intrusive condition that would adequately alleviate the burdens on traffic and drainage that the expansion of her business can be expected to cause.

[22] Petitioner's existing commercial use of her property of course already contributes to flooding problems and traffic congestion in the vicinity, and it may be appropriate to take such existing impacts into account in assessing the overall reasonableness of a dedication condition imposed as part of a permit allowing further development. The fact that the dedication requirement at issue here is not triggered unless the landowner undertakes a substantial change in the premises does not render it impermissible for the city to assess the cumulative burdens imposed by petitioner at that time. Cf. *Nordlinger* v. *Hahn*, 112 S. Ct. 2326 (1992).

III. THE DEDICATION REQUIREMENTS DO NOT UNFAIRLY CONCENTRATE EXCESSIVE BURDENS UPON PETITIONER

Petitioner places substantial emphasis on the fact that non-floodplain property owners in downtown Tigard who propose significant commercial development will not be required to make dedications similar to the one at issue here. The existence of marked disparities is relevant to takings analysis, since "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Nollan*, 483 U.S. at 835-836 n.4 (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). Petitioner has failed to demonstrate, however, that she has been singled out in a manner so unfair as to effect a compensable taking.

A. 1. Insofar as the actual floodplain portion of the dedication is concerned, petitioner's argument is clearly unavailing. The City's Master Drainage Plan (pp. 5-13 to 5-15, 8-11) contains the reasonable, unrebutted finding that owners (like petitioner) whose tracts abut Fanno Creek impose special burdens on the city's storm management system, and will reap unique benefits from improvements to the floodplain. That finding provides an ample basis for imposing on those landowners conditions that are not required for development of other property within the city's Central Business District. Owners of non-floodplain property in Tigard might well be asked to make other dedications unique to the characteristics of their property to offset the adverse impacts caused by their development. Furthermore, the adverse impact on petitioner is mitigated by the fact that she may count the entire area of the dedication against the 15% open-space and landscaping requirement that is generally applicable to commercial property in the vicinity.

Petitioner's "equal treatment" argument might at first appear to have greater force with respect to the pathway

portion of the dedication, since her proposed development seems unlikely to create greater traffic burdens than would a similar expansion across the street. We believe, however, that the pathway dedication requirement is also constitutional. In the first place, petitioner will realize offsetting advantages from the bikepath that are not available to businesses across the street, because her property will be immediately adjacent to the bikepath and will benefit from the additional access and amenities it affords.

Furthermore, the reason for the city's decision to impose the pathway dedication on a particular group of landowners is apparent: the projected pathway will run along the floodplain, and the dedication of easements by landowners across the street would not help to effectuate the city's Comprehensive Plan. This Court faced an analogous situation in *Penn Central*, where the takings claim was based in part upon the fact that the Landmarks Preservation Law restricted development only on properties having certain characteristics and did "not impose identical or similar restrictions on all structures located in particular physical communities." 438 U.S. at 133. The Court responded that "[i]t is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a 'taking.'" *Ibid.* In concluding that the burden imposed on Penn Central was not so disproportionate as to require compensation, the Court emphasized that substantial numbers of landowners were subject to the statutory restrictions and that Penn Central derived at least some reciprocal benefit from the law. *Id.* at 134-135. The same is true of the pathway portion of the dedication condition at issue here, because it corresponds to the special location and characteristics of petitioner's property and gives rise to a reciprocity of advantage among all persons (including petitioner) whose property abuts the floodplain.

2. In determining the degree of the disparity, the dedication condition must be viewed against the backdrop of other, generally applicable land-use regulations imposed by the city. In accordance with city practice and at petitioner's specific request, the city determined that petitioner may use the dedicated strip to meet landscaping and open space requirements, see Pet. App. G17, thereby relieving her of the expense of the landscaping and freeing up other portions of the parcel for commercial development. See *id.* at G28-G29. Similarly, in sustaining the prohibition against commercial development of air space at issue in *Penn Central*, the Court found it telling that the property owners could continue to make use of transferable air space credits at other parcels. 438 U.S. at 138. While petitioner cannot interfere with the public's use of the dedicated greenway, she may "transfer" her ability to use that strip of land to other portions of the site by applying it against the open-space requirement. The exactions at issue here therefore do not prevent petitioner from developing as great a percentage of her property as can the non-floodplain owners in the Central Business District. Cf. *American Dredging Co.* v. *New Jersey*, 404 A.2d 42, 43-44 (N.J. Super. 1979) (prohibition on filling wetlands portion of parcel with dredge spoils does not effect a taking because, inter alia, wetlands serve to meet open-space zoning requirement).

3. Thus, while the Takings Clause limits the government's freedom to single out particular individuals to absorb the costs of public improvements, see *Nollan*, 483 U.S. at 835 n.4, not every deviation from equality effects a compensable taking. As *Penn Central* makes clear, the breadth of the affected class and the degree of disparity in treatment among landowners are crucial in determining the propriety of the dedication requirement.[23] Assuming

[23] In assessing the extent of the burden placed on petitioner and other landowners similarly situated, it also is important to consider their reasonable investment-backed expectations. See n. 5, *supra*. Those landowners could not have anticipated that they would be able to

that the city might properly have denied petitioner's permit application outright—and that the exactions are reasonably fashioned to address the proposed expansion and the character of the affected property—the dedication condition in this case is not rendered unconstitutional by the fact that non-floodplain landowners are not subject to the same condition.

B. Finally, petitioner suggests (Br. 18, 35) that because the city has been planning for floodplain improvements and a comprehensive pathway system for some time, it is unreasonable to conclude that her proposed expansion actually precipitated the decision to condition the permit approval on the dedication. That the city has attempted to anticipate the adverse impacts of urban growth does not diminish petitioner's contribution to those problems. Nor does it diminish the benefits that she will realize as a result of the dedication and similar dedications by others, or the benefits that her enterprise has enjoyed from floodplain improvements by the city in the past. Comprehensive floodplain and transportation planning is precisely what one would expect from a well managed municipality. A city should not be precluded from acquiring greenway easements as an aspect of a permit process triggered by landowners who seek to add further and special burdens to the floodplain and traffic congestion through significant commercial expansion.

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make substantial economic use of the portions of their parcels within or immediately adjacent the floodplain. The interest in and expectation of excluding others from the premises is further affected by the fact that the tracts at issue are used for commercial purposes. Petitioner's property is open to the public, compare *PruneYard*, 447 U.S. at 80-85, and its profitability is directly linked to her ability to expand development and attract customers.

CONCLUSION

The judgment of the Supreme Court of Oregon should be affirmed.

Respectfully submitted.

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No. 93-518

In The
Supreme Court of the United States
October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Petition For Writ Of Certiorari
To The United States Supreme Court

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF NORTHWEST LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF NORTHWEST LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI

This motion of Northwest Legal Foundation (NLF) for leave to file the annexed amicus curiae brief is respectfully submitted pursuant to Supreme Court Rule 37. Consent to the filing of this brief has been granted by counsel for petitioner; this consent has been lodged with the Clerk of this Court. Consent has been withheld by counsel for the City of Tigard.

NLF is a non-profit, public interest law firm. NLF is dedicated to protect the rights of private landowners against excessive land use regulations being imposed at all levels of government. It is actively involved in drafting legislation, education, research and litigation. Our efforts are supported almost entirely by voluntary contributions.

NLF is motivated by the firm belief that private landowners should not bear burdens that in all fairness and justice should be borne by the public, a concept reiterated by Justice Scalia in *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987). NLF also holds the strong conviction that protection of private property is pivotal in our free market system. Moreover, NLF agrees with Justice Stewart that the protection of private property is essential to maintain all other civil rights protected by the U.S. Constitution. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

In this proceeding, NLF seeks to augment the argument in the petition for certiorari by highlighting 1) the

adverse impacts on landowners in Oregon and nationwide which could be triggered by the Oregon decision, and 2) the need to clarify and strengthen constitutional protection of private property. NLF believes that the decision of the Oregon Supreme Court is incorrect and poses a serious threat to property rights.

For the foregoing reasons, the Northwest Legal Foundation requests that this motion for leave to file the annexed amicus curiae brief be granted.

DATED: October 29, 1993

Respectfully submitted,

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I.

STATEMENT OF INTEREST

The Northwest Legal Foundation is a nonprofit, public interest law firm, which focuses on litigation concerning civil rights associated with ownership and use of private property, and is supported by approximately 600 members, primarily in Washington State. The decision below implicates fundamental rights of property owners.

II.

SUMMARY OF ARGUMENT

The decision below substantially undermines protection for private property owners established under the Fifth Amendment. The Oregon Supreme Court upheld a decision by Oregon's Land Use Board of Appeals ("LUBA") requiring a landowner seeking to replace the existing building in which it conducts its electric and plumbing supply business with a larger structure, to dedicate 7,000 square feet, approximately the same amount as the new building's additional square footage will be, to public purposes (i.e. future storm drainage and a bicycle pathway). Relying upon LUBA findings that it was "reasonable to assume" that customers "could" use the bicycle path (the idea of customers returning to their construction project carrying plumbing fixtures by bicycle is indeed captivating) and "could" offset some of the traffic demands on streets. From these assumptions about possibilities the City of Tigard Land Conservation and Development Commission (LCDC) concluded that the

requirements imposed upon landowners were "reasonably related" to the development.

The decision below applies the wrong test, and misapplies the test at that. As this Court held in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) in order to avoid activating the Takings Clause of the Fifth Amendment to the U.S. Constitution, an exaction by a government agency must have an "essential nexus" with the contemplated development. Even if a mere "reasonable relationship" were sufficient to meet constitutional requirements, the Oregon Supreme Court vitiates even that standard by concluding that the relationship may be established by speculation and assumption rather than persuasive evidence.

III.

ARGUMENT

A. The Importance and Clarity of This Case Justifies Review.

This case is especially appropriate for Supreme Court review because the factual record imposes no obligation to evaluate the sufficiency of the evidence. The Court need not go beyond the findings themselves to determine the speculative and conditional nature of the "reasonable relationship" finding. More artful findings could mask what a local agency is doing and muddle the consideration of the constitutional claim. The candor with which LCDC extracted its requirements presents this case to the court in an unequivocal legal form.

The decision below substantially undermines protection for private property owners established under the Fifth Amendment. Left unreversed, the decision may encourage similar unconstitutional takings not only in Oregon but elsewhere and may transform the "essential nexus" test to a "speculative possibility" test.

Further, the extent to which LCDC was willing to go illustrates the challenge to private property throughout the nation. The precedent set by LCDC is likely to be gratefully used by other government agencies to justify their takings.

B. The Decision Below Conflicts With the Fifth Amendment Principles Stated By This Court.

1. The Decision Fails to Apply the "Essential Nexus" Test.

In the past decade, in response to the increased efforts by local government agencies to acquire the use of private property for public purposes without compensation, this court has clarified the relationship which must exist before the government can avoid its obligation to pay for private property under the Takings Clause.

Clearly the City of Tigard has determined that a public bicycle pathway across the Dolan property is desirable. It could, if it wished, obtain title to or an easement across the land by condemnation, paying the landowner a just compensation.

Instead of condemning the pathway, however, the City sought to obtain it for nothing through a city ordinance which *required* dedication of a pedestrian/bicycle

path for *any* development along the designated pathway. (City Code Section 18.86.040(b)).

No relationship whatsoever is required under the City Code between the development and the requirement for the bike path. *Any* request for a development must be conditioned upon dedication and construction of the bike path if, but only if, the property lies on a designated path. Thus, under the ordinance even a development which could be shown to reduce traffic would be subject to the condition. Conversely, a development identical to the Dolan building located across the street, although it would entail an identical impact, would not be conditioned with the dedication of a bike path (because the project would not take place on the designated pathway).

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the court addressed the requirement that there be an "essential nexus" between the condition required by the government and the legitimate purpose served by the regulation. There, the nexus was absent when the right to reconstruct a house on beach front property was conditioned upon the granting of a public easement across the privately owned beach. The "lack of nexus" converted the building restriction from a legitimate exercise of the police power to a taking. As the court said:

> [U]nless the permit condition serves the same governmental purpose as the developmental ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

483 U.S. at 837 (quoting from *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 432 A.2d 12 (1981)).

There is no "essential nexus" between construction of a bicycle path and enlargement of a plumbing supply business where the dedication of the pathway does not turn on specific substantial impact of the development.

2. Even Under a "Reasonable Relationship" Test, the City of Tigard Conditions Do Not Meet Constitutional Standards.

The Oregon Supreme Court rejected the "essential nexus" test asserting that a lower standard, the "reasonable relationship" test applies. But as the findings of LCDC make clear, the conditions were imposed not because there was a "reasonable relationship" between the larger building and the public use of a bike path, but because there was a speculative, potential relationship.

As the dissenting opinion below stated:

> In essence, the only factual findings that support the pedestrian/bicycle pathway exaction are these: A larger commercial building is to be constructed and, as a result, there is anticipated to be "additional vehicular traffic." That is not enough to support what amounts to a virtual taking of petitioner's land. I would require findings that *demonstrate* that the increased intensity of use requires the exaction. These findings do not establish that the pathway exaction is needed because of any higher intensity of use.

317 Or. 110, 127 (emphasis in original).

If the decision below is not reviewed, it will remain as authority for the proposition that a "reasonable relationship" may be established without any evidentiary findings related to the actual impact of proposed project.

IV.

CONCLUSION

If this Court does not review or correct the decision below, other states will be encouraged to embark on similar regulatory schemes under the mistaken belief that the Fifth Amendment does not apply, unless total use is denied. Takings in the guise of regulation will continue to stifle individual rights.

DATED: October 29, 1993

Respectfully submitted,

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No. 93-518

In the

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND RICHARD K. EHRLICH IN SUPPORT OF PETITIONER, FLORENCE DOLAN

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND RICHARD K. EHRLICH IN SUPPORT OF PETITIONER, FLORENCE DOLAN

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and Richard K. Ehrlich respectfully move this Court for leave to file the attached amicus curiae brief in support of petitioner, Florence Dolan. Consent to the filing of this brief has been granted by counsel for petitioner, and has been lodged with the Clerk of this Court. Respondent City of Tigard has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992).

Richard K. Ehrlich is a property owner who, as a condition for a permit to build condominiums, was required to pay a $280,000 fee to help finance Culver City's public recreation facilities. Mr. Ehrlich was singled out to pay this fee because the land on which he desired to build condominiums housed a defunct private health club. Additionally, the city required the payment of a $33,000 fee

to fund its "art in public places" program. This fee not only was assessed in violation of the Takings Clause but also First Amendment Free Speech guarantees. While Mr. Ehrlich is required to subsidize the art, the artist maintains ownership and the city decides what art (and what message) will be displayed. The California Court of Appeal upheld these exactions without requiring a demonstration that they were designed to mitigate any public burden created by Ehrlich's project. *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737 (1993), *rev. denied* August 26, 1993.[1] Mr. Ehrlich's case represents a California court's misinterpretation of *Nollan's* requirement that an "essential nexus" exists between the public burden caused by the project and the exaction. The misinterpretation of this necessary close relationship (essential nexus) is also the critical issue in Mrs. Dolan's case now before this Court.

Amici seek here to augment the argument in the petition for writ of certiorari. PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. Mr. Ehrlich's personal experiences will provide a further viewpoint on these issues that may be helpful to this Court.

The present case involves an egregious violation of federal constitutional rights in the guise of local land use regulation. The decision below rests on the principle that local government entities, on the basis of speculation and assumptions, may place onerous conditions on the granting of a building permit without being subjected to judicial scrutiny beyond a "reasonable relationship" test. This principle runs contrary to *Nollan v. California Coastal*

---

[1] Mr. Ehlich is currently preparing a petition for writ of certiorari to file in this Court.

Commission, which stands for the proposition that the Constitution requires heightened judicial scrutiny to ensure that conditions on land use permits are "substantially related" to legitimate public interests and that there exists an "essential nexus" between the condition and mitigation of the impacts of the proposed development.

Amici believe the opinion below is in direct conflict with this Court's decision in *Nollan* and other regulatory takings cases. If allowed to stand, the opinion below will constitute a serious setback for individual rights by undermining the constitutional prohibition against taking private property without just compensation. This result would abridge fundamental notions of fairness and equity by unconscionably tipping the constitutional balance in favor of the state's regulatory power over the rights of the individual.

For the foregoing reasons, Pacific Legal Foundation and Richard K. Ehrlich request that their motion to file the amicus curiae brief which follows be granted.

DATED: October ___, 1993.

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND RICHARD K. EHRLICH IN SUPPORT OF PETITIONER FLORENCE DOLAN

INTERESTS OF AMICI CURIAE

The interests of amici curiae are set forth in the preceding motion and are adopted herein.

OPINION BELOW

The opinion of the Oregon Supreme Court is reported at *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993). The court held, *inter alia*, that when a building permit is conditioned upon dedication of an easement, the condition does not effect a taking of private property if the condition is "reasonably related" to a legitimate state interest. *Id.* at 119. The court below stated that the city's site development review exactions did not effect a taking, even though the city had no site-specific studies or other evidence to show Mrs. Dolan's project would cause the level of burden the exactions were designed to mitigate. *Id.* at 120-21. Disregarding *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the court below ruled that the transportation impacts and storm water runoffs, asserted by the city in its "findings" as being associated with the expansion of the Dolans' store, were reasonably related, respectively, to the requirements to dedicate land for a pedestrian/bicycle pathway and a greenway. *Id.* The court rejected Dolans' contention that the exactions bore no relationship to their specific development because the city had no site-specific studies and it engaged in the generic practice of demanding identical exactions from *all* developments, regardless of size or intensity. *Id.*

STATEMENT OF THE CASE

Florence Dolan owns a plumbing supply store in the City of Tigard, Oregon. She applied to the city for a permit to replace her existing store with a new, expanded, store (a use contemplated by and fully within zoning requirements for the site). The city informed Mrs. Dolan and her late husband, John T. Dolan, they could have their permit on two conditions: First, they would have to dedicate a greenway

easement across a portion of their property abutting Fanno Creek; and second, they would have to dedicate an additional easement adjacent to the greenway easement for a pedestrian/bicycle pathway. The combined easements represent 7,000 square feet (approximately 10%) of Mrs. Dolan's property.

The city's asserted justifications for these conditions were based not on factual findings regarding this proposed project, but on speculation, assumptions, and an overriding goal to acquire the property without using the proper eminent domain procedures. *Dolan*, 317 Or. at 113-14 (majority); and 123, 126 (Peterson, J., dissenting). Nevertheless, the administrative agencies and courts to which the Dolans pleaded for relief denied the Dolans any compensation whatsoever.

REASONS FOR GRANTING THE WRIT

I

THE OREGON SUPREME COURT'S ANALYSIS CONFLICTS WITH THE HEIGHTENED SCRUTINY MANDATED BY DECISIONS OF THIS COURT

In its leading case in the field of regulatory takings, this Court clearly established that land use regulations challenged under the Takings Clause must be subjected to a heightened standard of judicial review. In *Nollan*, 483 U.S. 825 this Court reaffirmed the bright-line test set forth in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), that a regulatory taking occurs where a regulation does not "substantially advance" a legitimate state interest. *Nollan* explains that in the context of a permit condition, the test is met under these circumstances: first the government must be able to deny the permit outright, 483 U.S. at 835-36, second the "permit condition [must] serve[] the same legitimate police-power

purpose as a refusal to issue the permit," 483 U.S. at 836, and third the permit condition must serve to mitigate the public burden or need created by the project sought to be permitted. *Nollan*, 483 at 838, 849. Therefore, a permit condition must bear an essential nexus to not only a legitimate police power purpose that could have been used to deny the permit in the first place, but to the burden created by the proposed project. *Id.* at 837. The government establishes the essential nexus by demonstrating that a particular project has caused a burden on the community which the specific conditions are designed to ameliorate:

> [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have *required* that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 835 n.3 (citations omitted; emphasis added and in original).

Courts are intended to view infringements on property rights very seriously as the *Nollan* Court warned:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.

Nollan, 483 U.S. at 841. Unless the permit condition serves the same governmental purpose as prohibiting development of the land at all, the building restriction is not a valid regulation of land but "'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837. The heightened scrutiny

requirement also was recently emphasized by this Court in *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153, 167 (1992). Disregarding the plain teaching of this Court in *Nollan* the Oregon Supreme Court declined to apply any meaningful scrutiny to the ordinance at issue. Identifying a legitimate purpose of regulation is only the first step in avoiding a finding of a taking. Equally important is the second step, in which the regulatory body must "demonstrate *a specific and logical connection* between burdens produced by new development and conditions designed to alleviate such burdens." William A. Falik & Anna C. Shimko, *The "Takings" Nexus--The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 Hastings L.J. 359, 389 (1988) (emphasis added; footnote omitted). Without applying this second step to a given set of facts, a court cannot determine whether the regulation "substantially advances" the legitimate state interest.

Missing from the Oregon Supreme Court's decision is any analysis of whether the City of Tigard would be justified in denying Mrs. Dolan's permits on the basis of increased bicycle or pedestrian traffic or increased need for storm drainage. A bicycle and pedestrian path as well as more storm drainage are presumably legitimate interests of the City of Tigard. However, making Mrs. Dolan contribute to these interests is legitimate only if denial of the permits would be justified on the ground that their project would interfere with these interests.

The court below justifies its minimal analysis by finding that *Nollan* only imposes a "reasonable relationship" standard (rather than a substantial advancement standard) for determining the permissibility of imposing conditions responsive to the impacts of particular developments. *Dolan*, 317 Or. at 119. The court justifies this standard by reference to two Ninth Circuit Court of Appeals' decisions: *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), and *Commercial*

Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 118 L. Ed. 2d 593 (1992). *Parks*, of course, predates *Nollan* and can have no interpretative value with respect to *Nollan*. As discussed *infra* at 12-13, *Commercial Builders* misinterpreted *Nollan* by refusing to acknowledge the enhanced standard of review mandated by this Court's opinion.

A. The Court Below Did Not Apply Heightened Scrutiny to the Pedestrian/Bicycle Pathway Condition

In this case, heightened scrutiny will bear out the fact that no nexus (much less an essential one) exists between the city's conditions of a greenway and pedestrian/bicycle pathways and the impacts to be created by Mrs. Dolan's expanded plumbing supply store. The city conducted no study whatsoever to support its conclusions. Instead, the city simply made deductions and assumptions based on its own sense of logic and nothing more. The city's findings stated:

> It is reasonable to *assume* that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. ... In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

Dolan, 317 Or. at 113-14 (emphasis added).

The fact that the pathway *could* be used is nothing more than supposing that having a pathway is a good idea and will benefit Mrs. Dolan's customers and employees, as it will benefit every other citizen of the City of Tigard. The findings of fact that the bicycle pathway system "'*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand." *Dolan*, 317 Or. at 127 (Peterson, J., dissenting) (emphasis in original).

Certainly, the City of Tigard could not have denied Mrs. Dolan's permit on the grounds that her customers' and employees' recreation needs are not being met. There is simply no nexus or reasonable relationship between the new development of an enlarged plumbing supply store and its customers' recreational needs. What the city should have shown--but did not--was that it could have denied Mrs. Dolan's permit on the ground that her project would increase traffic and the bicycle/pedestrian pathway would do no more than alleviate the burden caused by Mrs. Dolan's project. So far, the City of Tigard's articulations have shown a presumed connection which is nothing more than "an exercise in cleverness and imagination." *Nollan*, 483 U.S. at 841.

B. The Court Below Did Not Apply Heightened Scrutiny to the Floodplain Greenway Condition

In regard to the floodplain dedication, the court below relied on the city's findings that

> [t]he increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods

> of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes.

Dolan, 317 Or. at 114. This finding only acknowledges that the City of Tigard has an existing problem with this drainage basin and the enlarged store and parking lots' increased surface area *could* add to this problem. As Justice Peterson noted in dissent, the contribution of this project to runoff may be only a "thimbleful." *Dolan*, 317 Or. at 128 (Peterson, J., dissenting). The city must show that the granting of the permit probably will create specific problems, burdens, or conditions that previously did not exist. The city must then show that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise from the granting of the permit. General statements of concern about increased traffic or public safety are insufficient to support, as permissible regulation, what otherwise would be a taking. *Dolan*, 317 Or. at 123 (Peterson, J., dissenting).

In the present case, the city's desires to construct a greenway and bike trails are totally unrelated to any burden created by Mrs. Dolan's proposed expansion of her plumbing supply store. When Tigard's exactions are subjected to the heightened scrutiny required by *Nollan*, it is apparent that Tigard's actual purpose is identical to that of the condition demanded by the California Coastal Commission: "[T]he obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." *Nollan*, 483 U.S. at 837. The government must show more than a theoretical nexus.

II
THE DECISION BELOW CONFLICTS WITH OTHER STATE SUPREME COURTS THAT HAVE FOLLOWED THIS COURT'S MANDATE

As opposed to the Oregon Supreme Court's decision, *Nollan's* requirement of heightened scrutiny in regulatory takings cases has been recognized and correctly applied by state courts faced with federal takings claims brought under the Fifth and Fourteenth Amendments.

A. The New York Court Demonstrated Correct Understanding and Analysis of Heightened Scrutiny Under Nollan

The New York Court of Appeals struck down a law requiring the imposition of a monetary exaction on hotel owners who wanted to stop using their hotels as single room occupancy, low rent housing. The court held:

> [Regulatory takings challenges require] "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in *Nollan*.

Seawall Associates v. City of New York, 542 N.E.2d 1059, 1068 (N.Y.), *cert. denied*, 493 U.S. 976 (1989). Analyzing the law, the court noted that the city's asserted nexus between the obligation placed on the property owners and the state interest was "indirect at best and conjectural." *Id.* at 1069. The conjectural nature of the connection was so tenuous that the court found it could not justify singling out the property owners to bear the costs of curing a larger societal ill--in this case, homelessness. *Id.* In the case now before this Court, the speculative musings of the City of Tigard are insufficient to demonstrate the required essential nexus.

B. The Oregon Supreme Court's Decision Conflicts with the New Jersey Court's Correct Statement of Nollan's Heightened Scrutiny

The New Jersey Supreme Court has also explicitly recognized the heightened scrutiny requirement of *Nollan*:

> [T]he United States Supreme Court has acknowledged that the "rationality" standard determinative of substantive-due-process challenges to State regulation is less stringent than the "takings" standard, which requires that the taking "substantially advance" the State interest to be achieved.

In the Matter of the "Plan for Orderly Withdrawal from New Jersey" of Twin City Fire Insurance Company, 609 A.2d 1248, 1259 (N.J. 1992), *cert. denied*, ___ U.S. ___, 122 L. Ed. 2d 370 (1993) (citing *Nollan*, 483 U.S. 825).

C. A California Court Has Similarly Recognized the Heightened Scrutiny Requirement

Even California--whose courts were singled out in *Nollan* as particularly hostile to property rights[1]--has produced a decision acknowledging and applying the enhanced standard that *Nollan* requires.

> Nollan ... changed the standard of constitutional review in takings cases. Whether the new standard is described as "substantial relationship," or "heightened scrutiny," it is clear the rational basis test ... no longer controls.

Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260, 1270 (1991) (footnotes omitted).

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[1] *Nollan*, 483 U.S. at 839.

This California Court of Appeal decision provides a good example of a court properly applying the *Nollan* test to conditions imposed on a permit to develop a revetment on oceanfront property. The plaintiff challenged the dedication of an easement for public access along the beach. In evaluating these conditions, the court reviewed generic studies relied on by the Coastal Commission which indicated that such revetments "typically exacerbate erosion of the beach in front of them." *Surfside Colony*, 226 Cal. App. 3d at 1265. Nevertheless, the Court of Appeal concluded that the dedication condition effected a taking of the property because

> the Commission had no evidence at all establishing *this* revetment would cause erosion at *this* beach.
>
> We must therefore conclude no substantial evidence exists to justify a "nexus" between the revetment and the public access requirement. Under *Nollan*, the access requirement must be deemed a "taking" of Colony's property.

Id. at 1269 (emphasis added). The court in *Surfside* understood that *Nollan* requires far more than an assumed relationship between the condition and the need created by the development. Because the "nexus" between the actual development and the condition must be substantial, the court concluded that "[w]ithout any site-specific evidence supporting the Commission's decision, we cannot say the Commission had "substantial evidence" justifying the need for an easement over Colony's property." *Id.* at 1272.

III
THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

A. Some Courts Have Created a Pattern of Refusing to Apply the Holding of Nollan

Recently, some lower courts especially the Ninth Circuit have blatantly misinterpreted *Nollan*. For example, in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, instead of comparing the permit condition (a fee to fund low income housing) and the applicants' projects (commercial buildings), the Ninth Circuit Court of Appeals deferred to the city "because we find the Ordinance sufficiently related to the legitimate purpose it seeks to achieve" (*i.e.*, "expanding low income housing"). *Id.* at 873.

The relationship which that court found sufficient is also a departure from *Nollan*. As previously noted, *Nollan* requires courts to find a constitutional nexus between the permit condition and the applicant's proposed project to determine whether the condition is truly remedial of adverse impacts caused by the project. Yet, the *Commercial Builders* court wrote:

> "Prior to *Nollan*, other federal courts ... upheld ordinances placing restrictions or conditions upon development where the ordinances were reasonably related to legitimate public purposes.
>
> ....
>
> As a threshold matter, we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to this Ordinance."

Commercial Builders, 941 F.2d at 874.

In an even more troubling ruling, one California court (attempting to reconcile *Commercial Builders* with the fact that *Nollan* does require heightened scrutiny) proclaimed that *Nollan* does not apply to regulatory takings cases at all. *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 135 (1992). In *City and County of San Francisco v. Golden Gate Heights Investment*, 14 Cal. App. 4th 1203 (1993), *cert. denied*, ___ U.S. ___, 1993 WL 323192, the California Court of Appeal also characterized *Nollan* as a physical takings case. *Id.* at 1209. In support it cited *Blue Jeans Equities* and *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d at 161, which found the exact opposite.

The California courts, with the exception of *Surfside Colony*, discussed *supra*, have continued unabated their pattern of misinterpretation of *Nollan's* requirements. Amicus Richard Ehrlich has been the victim of one such opinion which managed to find a justification for the imposition of a $280,000 recreation fee and a $33,000 arts fee.[2] *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737

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[2] The arts fee is particularly egregious in its twofold attack on individual constitutional rights. Not only does it violate Mr. Ehrlich's guarantee of just compensation for a regulatory taking, but it also violates Mr. Ehrlich's right of free speech by turning him into a private endowment for the arts. Under the First Amendment, Ehrlich has the right to refuse to subsidize artistic speech with which he disagrees. *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters--to take a nonexhaustive list of labels--is not entitled to full First Amendment protection" (footnote omitted)); *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990).

(1993). In *Ehrlich*, the inherent vice of the California Court of Appeal's decision is its conclusion that conditions requiring exactions are acceptable if they (1) advance a legitimate governmental interest and (2) leave a property owner with economically viable use. In reaching this conclusion, the court did not require any showing that the exaction was designed to mitigate any public burden created by the project itself. Indeed, the court stated that the "fee was not imposed as a condition relating to the development project's burden on the community for increased community services," but only because of a "benefit conferred" and the burden from the loss of nonexistent recreational facilities. *Id.* at 1749-50. This reasoning, and the necessary conclusion resulting from it, directly conflict with this Court's mandate in *Nollan*.

The aberrant decisions discussed above, including *Dolan*, have created a conflict among state jurisdictions and the United States Supreme Court on this vital issue. Some courts even refuse to apply this Court's requirement of heightened scrutiny. The pattern demonstrated by those decisions underscore the need for this Court to grant the writ of certiorari sought by Mrs. Dolan to resolve conflicts among the jurisdictions over the heightened scrutiny requirement set forth in *Nollan*.

B. Policy Considerations Require Strict Adherence to Nollan

The right to make reasonable use of property, free from extorsive governmental demands, involves a matter of individual liberty and a basic civil right which should be jealously guarded by the courts.

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation ... is in truth a "personal" right .... In fact, a fundamental interdependence

> exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

The importance of this case is found both in the breadth of its impact and the nature of the issues raised. Even beyond its clear conflict with the standards laid down by this Court in *Nollan*, the city's actions violate the Takings Clause by requiring petitioner alone to bear what should rightfully be a general public burden. In addition to examining the nature of the state action embodied in land use regulations, and its economic impact on property owners, this Court has assigned unique significance to this question of fundamental equity. "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Any presumed benefits of the pedestrian/bicycle pathway and greenway would accrue to the community as a whole. It follows as a general principle of constitutional law that the costs of constructing these pathways and greenways, *including the cost of acquiring the right of way*, must be financed out of general public revenues. The city is prohibited under the Fifth and Fourteenth Amendments of the United States Constitution from requiring individual property owners to bear the costs of its land acquisition program.

In *Nollan*, the Coastal Commission wanted access to the Nollans' beach as part of a comprehensive program to provide continuous public access along Faria Beach as the adjacent lots underwent development or redevelopment. *Nollan*, 483 U.S. at 841. If "Fanno Creek" were substituted

for "Faria Beach" and "storm water management and greenway purposes" for "continuous public access," the parallels between *Nollan* and *Dolan* become blatant. This Court's response to the Coastal Commission's justification was that California "is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' ... but if it wants an easement across the Nollans' property, it must pay for it." *Nollan*, at 841-42. Oregon apparently needs the same message spelled out for it.

With respect to takings jurisprudence, courts struggle with two essentially opposing tendencies. First is a tendency to recognize the legitimacy of attempts by government to regulate property in ways that once might have been unthinkable. *Dolan*, 317 Or. at 128 (Peterson, J., dissenting). The second tendency (a corollary of the first) is for state and local governments to attempt to further particular goals by conditioning the uses of private property. Property owners are denied their rights to build unless they "dedicate" some portion of their property to support the particular government program. Governments, therefore, face strong temptations, particularly in times of limited tax revenues, to place the primary burden for funding projects on the shoulders of those whose private property happens to be in the neighborhood of the proposed projects. As Justice Peterson eloquently stated in his dissent:

> The trouble is, what once would have been recognizable as extortion may turn, in time, into something considered benign because it is so familiar. That transmogrification is encouraged every time a court cannot distinguish whether a particular governmental regulation falls within the ambit of the second tendency, rather than the first.

> ... The findings relating to the need for exactions arising from future increased intensity of use after the property is developed must establish more than a *potential* increase in intensity; they must establish more than *some* increase in intensity; they must establish a bona fide need for the extraction that arises from the development.

Dolan, 317 Or. at 129 (Peterson, J., dissenting) (emphasis added).

The rejection of *Nollan's* heightened scrutiny requirement by the court below is more than a simple mistake in the application of federal constitutional law. Rather, it amounts to a denial of fundamental rights guaranteed by the United States Constitution. The appropriate standard of judicial review is not a mere procedural detail. In close cases, the level of scrutiny determines the outcome of litigation. *See* R. S. Radford, *Statistical Error and Legal Error*, 21 LOY. L.A. L. REV. 843, 870-79 (1988). In the context of regulatory takings, the level of scrutiny determines whether or not individual property rights will be protected against predatory and confiscatory regulations.

The ruling in *Nollan* indicates that this Court believes the issue presented here is important enough to justify a grant of review. Although *Nollan* explicitly set a heightened standard of review which must be applied to exactions imposed on building permits, lower courts have deliberately circumvented the language in *Nollan* to come to results that cannot be harmonized with that case. For the benefit of those courts which have yet to acknowledge and apply the required heightened scrutiny in takings cases, this case presents this Court with the opportunity to clarify this area of the law. Thus, the Court should grant review to settle an

important question of federal constitutional law impacting a significant segment of the population.

CONCLUSION

In the post-*Nollan* world, a clear pattern has emerged in which some state and federal courts have employed legal trappings and misanalysis to undermine the landmark *Nollan* decision. The facts here present an excellent opportunity for the Court to finish the analysis begun in *Nollan*. Review by this Court is necessary to resolve the conflicts created by the Oregon Supreme Court's decision in this case and to alter the current trend of decisions away from the mandates of this Court's decisions. Amici curiae respectfully urge this Court to grant the petition for writ of certiorari and reverse the judgment of the Oregon Supreme Court.

DATED: October, 1993.

Respectfully submitted,

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October Term, 1993

Florence Dolan,

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v.

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Respondent.

On Petition for Writ of Certiorari to the
Oregon Supreme Court

NATIONAL ASSOCIATION OF HOME BUILDERS AND INTERNATIONAL COUNCIL OF SHOPPING CENTERS MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF IN SUPPORT OF THE PETITION

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NATIONAL ASSOCIATION OF HOME BUILDERS AND INTERNATIONAL COUNCIL OF SHOPPING CENTERS MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE

The National Association of Home Builders (NAHB) and the International Council of Shopping Centers (ICSC) respectfully move this Court for leave to file the accompanying brief amici curiae in support of Petitioner. These amici curiae have received the petitioner's written consent to file this brief and have filed the letter of consent with the Clerk of this Court. The respondent city has declined our request for consent to file a brief in support of the petition.

The NAHB represents 165,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The ICSC is the trade association of the shopping center industry. It has approximately 24,000 members worldwide and approximately 22,000 in the United States. Its members, including developers, owners, retailers, lenders and all others having a professional interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. It represents almost all of the 37,000 shopping centers in this country and is the only U.S. trade association specific to shopping centers.

The just compensation clause serves as a vital shield against oppressive governmental land use regulation. It is, therefore, of paramount importance to these amici, both non-profit trade associations, and our members. The actual, as opposed to merely theoretical, availability of an appropriate constitutional remedy for the governmental action that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests. The latter type of governmental imposition is presented in this case by the city's demand that an individual private property owner dedicate her land for a public bike path and greenway system along a river because the landowner wishes to lawfully expand her electrical and plumbing supply business.

That a bike path and greenway system along a river are legitimate and worthwhile public desires is not the question. The question is whether the land for and construction of these public amenities must be contributed by individual private property owners, without payment therefor, who happen to own and wish to improve land that is within the government's chosen path for such facilities.

The NAHB has been before this Court either as an amicus curiae in support of or as of counsel on behalf of the property owner in prior "takings" cases involving governments' land use decisions. Yee v. City of Escondido, 112 S. Ct. 1522 (1992); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980). The NAHB and ICSC joined to file an amici curiae brief in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). The NAHB's brief was favorably cited in this Court's Nollan opinion, 483 U.S. at 840, the opinion that is at the heart of the present controversy.

The attached brief is submitted to show the dire need to resolve the question of whether land exacted by the government from an individual, as a condition for using her own private property, is an unconstitutional taking of private property when the exaction is used for a legitimate public purpose but the individual does not directly, substantially or in any other essential way contribute to the public's need to further such a purpose.

These amici sincerely believe that the accompanying brief will assist the Court in making its decision whether to grant plenary review of the issues presented in the petition. Our concerns are much broader than those of petitioner since our

members are faced with countless regulatory decisions on a daily basis across the nation that affect the use of privately held land. The vast majority of these decisions come from local governments and, as pointed out in the accompanying brief, some of these decisions do not respect the constitutionally protected property rights of individuals. While petitioner focuses her arguments on the harm the City of Tigard inflicts on her concerns, our brief cites authorities different from those in petitioner's brief and also addresses the broader public policy reasons why plenary review should be granted.

For the above reasons, this Motion should be granted.

Respectfully submitted,

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Agins v. City of Tiburon, 447 U.S. 255 (1980) 4

Armstrong v. United States, 364 U.S. 40 (1960) 5

Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, appeal dismissed, 404 U.S. 878 (1971) 9

Balch Enterprises, Inc. v. New Haven Unified School District, 268 Cal. Rptr. 543 (Ct. App. 1990) 12

Board of Supervisors of West Marlborough Township v. Fiechter, 566 A.2d 370 (Pa. Commw. Ct. 1989) 13

Castle Properties Co. v. Ackerson, 558 N.Y.S.2d 334 (N.Y. Sup. Ct. 1990) 13

Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976) 17

Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992) 11

Dolan v. City of Tigard, 317 Or. 110, 854 P.2d 437 (1993) 5,6,8,11

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 19

Florida Rock Industries, Inc. v. United States, 21 Cl. Ct. 161 (1990) 4

Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970) 10

Grupe v. California Coastal Commission, 212 Cal. Rptr. 578 (Ct. App. 1985) 9

Holmdel Builders Association v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) 12

CASES: **Page**

J.E.D. Associates, Inc. v. Town of Atkinson, 432 A.2d 12 (N.H. 1981) 17

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 4

Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990) 4

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) . . . . . passim

Park v. Watson, 716 F.2d 646, 653 (9th Cir. 1983) 8,9

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 18

Pennell v. City of San Jose, 485 U.S. 1 (1988) 18

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) . 3,19

Pioneer Trust and Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961) 9,10

Plote, Inc. v. Minnesota Alden Co., 422 N.E.2d 231, 235-36 (Ill. App. Ct. 1981) 10

Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960) 10

Seawall Associates v. City of New York, 542 N.E.2d 1059, 544 N.Y.S.2d 542, cert. denied, 110 S. Ct. 500 (1989) 5,13

Surfside Colony, Ltd. v. California Coastal Commission, 277 Cal. Rptr. 371 (Ct. App. 1991) 5,13

Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988) . 17

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) 4

CASES: **Page**

Weatherly v. Town Plan and Zoning Commission of the Town of Fairfield, 579 A.2d 94 (Conn. App. 1990) 12

William J. Jones Insurance Trust v. City of Fort Smith, Arkansas, 731 F.Supp. 912 (W.D.Ark. 1990) 13

Yee v. City of Escondido, 112 S. Ct. 1522 (1992) 5

MISCELLANEOUS:

Babcock, Forward to Exactions: A Controversial New Source For Municipal Funds, 50 Law & Contemp. Problems 1 (1987) 16

Bauman & Ethier, Development Exactions and Impact Fees: A Survey Of American Practices, 50 Law & Contemp. Problems 51 (1987) 15

Berger, Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases, 70 Neb. L. Rev. 186 (1991) 14

Best, The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions, 10 Zoning & Plan. L. Rep. 153 (1987) 13

Falik & Shimko, The "Takings" Nexus -- The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California, 39 Hastings L. J. 359 (1988) . . . 13

Alexander Hamilton, The Federalist Papers, No. 80 (C. Rossiter Ed. 1961) 14

Daniel R. Mandelker, Land Use Law (2d ed. 1988) 14

Minda, The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Taking Problem, 62 U. Colo. L. Rev. 599 (1991) 13

Peterson, Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches, 39 Hastings L. J. 335 (1988) 14

TABLE OF AUTHORITIES
(cont'd.)

CASES: **Page**

Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L. Rev. 839 (1983) 16

Smith, From Subdivision Improvement Requirements To Community Benefit Assessments and Linkage Payments: A Brief History Of Land Development Exactions, 50 Law & Contemp. Problems 5 (1987) 15

Taub, Exactions, Linkages, and Regulatory Takings: The Developer's Perspective, 20 The Urban Lawyer 515 (1988) 16

Williams, Legal Discourse, Social Vision and The Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan, 59 U. Colo. L. Rev. 427 (1988) 14

IN THE

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No. 93-518

Florence Dolan,

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City of Tigard, Oregon,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND INTERNATIONAL COUNCIL OF SHOPPING CENTERS AS AMICI CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICI CURIAE

The interest of the amici curiae is set forth in the preceding motion for leave to file this brief.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

This Court has repeatedly stated that a governmental action violates the takings clause of the Fifth Amendment if the action does not substantially advance legitimate government interests. The leading application of this prong of takings doctrine appears in Nollan v. California Coastal Commission, 483

U.S. 825 (1987). This rule is essential to guard against governmental acts that would impose on individuals costs that properly belong with the public as a whole even though the individual has not been denied all, or substantially all, economically viable use of its property.

The City of Tigard's land dedication exaction does not substantially advance its legitimate government interest in wanting a public bike path and greenway system along a river. The city justifies its land exaction through a purported but unsupported nexus between an otherwise lawful land use proposal and the city's professed need for a bike path and greenway system. The city's justification is based on mere assumptions and findings of general facts as to the burdens created by the proposed use of land and how such exactions would alleviate those burdens. While clever and imaginative, the justification is far too tenuous to pass constitutional scrutiny. If it is allowed to stand, governments at all levels will feel ever more free to contrive any nexus, no matter how flimsy, between an individual's proposed use of his or her land and the furtherance of a legitimate public purpose. Nollan's requirement for a direct, essential nexus, Id., 483 U.S. at 835 n.3, 837, will have vanished.

Additionally, while the decision below follows a few similar interpretations of the extent of Nollan's required nexus, it is directly contrary to still other courts and the greater weight of published authority, which interprets Nollan as requiring heightened scrutiny of government's claimed nexus. The growing body of case law and published thought on both sides of this important federal question requires further guidance from this Court. Moreover, from a public policy perspective alone, those suffering under the deplorable state of affairs of the land use regulatory system across the country are desperate, if not greatly anxious, for further United States Supreme Court supervision of their constitutional rights.

There is something horrific in the city's position that a merely professed nexus, i.e., between the public burdens that are

assumed to be created by a private project and the approval conditions ostensibly designed to take care of such burdens, is sufficient to deprive individuals of their private property with no compensation merely because the private owner wants to use her land in a lawful way. Something more substantial is required by the Constitution's just compensation clause. Planning for and acquiring the necessary land and capital to build adequate public facilities to support our cities and towns, such as alternative bike and pedestrian pathways and river greenways, are important governmental functions in maintaining society's quality of life. But propositions that further those ends must respect the property rights of individuals. Anything short of that proper respect, as has occurred here, is repugnant to the higher considerations expressed in the Constitution and cannot stand, at least without just compensation. The constitutional rights at issue in this case, which were not upheld below, must be reconfirmed by this Court.

These amici respectfully request the Court to grant certiorari in order to evaluate, after plenary consideration of the issues presented, the appropriate nexus required by the Constitution's takings clause in these situations. It is our hope that after the Court reviews the case it will send anew the message to all governments that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

REASONS FOR GRANTING THE WRIT

I. THE QUESTION BEFORE THE COURT IS A SUBSTANTIAL YET UNRESOLVED FEDERAL QUESTION DESERVING OF THIS COURT'S SUPERVISION

A. The Substantial Advancement Prong Of The Fifth Amendment's Takings Clause, Which Ostensibly Prohibits The Type Of Permit Condition Exacted In This Case, Is In Jeopardy Of Becoming A Useless Limitation On Government Power

This Court has reiterated that a regulatory taking occurs if a government regulation either denies a property owner economically viable use of the property or does not substantially advance a legitimate government interest. Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 485 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). The importance of maintaining the distinction between these two takings tests should be self-evident. There are occasions where a government's actions substantially advance legitimate government interests but nonetheless deny a particular landowner all, or substantially all, economically viable use of the private property.[1] Likewise, there are situations, such as in this case, where a government's actions do not deny a landowner

[1] See, e.g., Florida Rock Industries, Inc. v. United States, 21 Cl. Ct. 161 (1990); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990); Cf. United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985) (While upholding the Clean Water Act's grant of jurisdiction to regulate certain wetlands, the Court noted that a property owner can still bring a takings claim in U.S. Claims Court if a dredge or fill permit is applied for and denied and the "effect of the denial is to prevent 'economically viable' use of the land in question").

economically viable use of the property but nonetheless do not substantially advance a legitimate government interest. Nollan, 483 U.S. 825; Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260 (1991); see also Yee v. City of Escondido, 112 S. Ct. 1522, 1532 (1992) (Petitioners allegation that an ordinance "does not 'substantially advance' a 'legitimate state interest' . . . does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property . . . ."). These two tests are an important part of this Court's effort to protect individuals in situations where it would be unfair to impose costs on an individual that properly belong with the public. See Armstrong v. United States, 364 U.S. 40, 49 (1960); Seawall Associates v. City of New York, 74 N.Y.2d 92, 107, 542 N.E.2d 1059, 1065 (1989).

The substantial advancement takings test, as applied to land use permit exactions, requires that there be an "essential nexus" between a permit condition and the burden placed on the community by the proposed land use. See Nollan, 483 U.S. at 835 n.3, 837. The issue presented, which "involves questions of federal law," Dolan v. City of Tigard, 317 Or. 110, 122, 854 P.2d 437, 444 (1993) (Peterson, J., dissenting), is whether the city's demand that the property owner dedicate land for a bike path and greenway along a river bordering her property substantially advances, in the constitutional sense, the city's legitimate interest in providing such public facilities. That is, the question involves whether there is an essential nexus between the burdens on the city that are caused by Dolan and the Dolan's permit condition. The question presented involves an essential constitutional limitation on the burgeoning growth of the regulation of the use of private land and its resolution is absolutely critical to the livelihood of the members of these amici as well as the pursuit of happiness by all property owners and those desiring to own property.

Here, the petitioner wishes to use her property in a way that lawfully expands the current business on the site for which

she is penalized by the forced dedication of her land to the public. This exaction is based solely on professed and, at best, weak assumptions made by the city's regulators as to the connection between the burdens created by the expanded use and the exaction that is supposed to resolve those burdens. This cannot be the concept of fairness and justice embodied in the Fifth Amendment. Yet the Oregon Supreme Court lets the land dedication requirement stand without just compensation upon the court's minimal review. Dolan, 317 Or. 110. If the court below is correct, then this Court's 1987 Nollan decision, after only a few years, has collapsed under the weight of lower court interpretations, and the "substantial advancement of legitimate government interests" takings test has become meaningless to property owners.

We do not propose that private property rights always rise to a constitutional level that thwarts all, or even most, legitimate public purpose regulations. Our society could not function if that were so, particularly since the legitimacy of regulations is given such great latitude and we live in an increasingly populated and closer world. But mere assumptions by government regulators, as here, or even findings of fact that are less than substantial are not sufficient to survive constitutional scrutiny if private property rights are to have any meaning in our constitutional culture. If the constitutional guarantee at issue here has any substance to it at all, surely the city must find substantial and concrete facts that prove on the record this Court's "essential nexus" before the city is allowed to take a portion of private property without compensation merely because the property owner wishes to conduct an otherwise lawful and proper use on it.

B. The City of Tigard's Land Dedication Requirement Does Not Meet The Essential Nexus Requirement This Court Established In Nollan v. California Coastal Commission, 483 U.S. 825 (1987)

This case is very much like the Nollan case, where the Court admonished the government for its attempt to compel a property owner to contribute to the realization of an easement, even though the government "may well be right that [the easement] is a good idea." Id., 483 U.S. at 841. The Court stated in Nollan, 483 U.S. at 842, that if the government "wants an easement across the Nollans' property, it must pay for it." Similarly here, Tigard may well be right that providing a public bike and pedestrian path and a river greenway system is a good idea. But, if the city wants to provide such facilities, it must pay for it.

These amici believe this Court's opinions stating that a government's actions must "substantially advance a legitimate government interest" mandates, in the takings context, a direct connection between the government action and both the burden the individual places on the community and the benefits the individual will receive from the government action. In examining this direct connection, i.e., the Court's "essential nexus," Nollan, 483 U.S. at 837, the Court has stated that the review requires more than the standard applied in due process or equal protection cases.

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal-protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, . . . not that the "State 'could rationally have decided' the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 835 n.3 (citations omitted; emphasis in original). Yet the Oregon Supreme Court says that it "does not read Nollan" as "abandon[ing] the 'reasonably related' test for a more stringent 'essential nexus' test," Dolan, 317 Or. at 120, 854 P.2d at 443, and went from there to provide an extremely deferential review of Tigard's actions, one that is equivalent to the deferential review provided to governments in due process and equal protection challenges.

In rationalizing its view of the required nexus, the Oregon Supreme Court tells us with circular logic that this Court's "essential nexus" means that an essential nexus is one that is reasonably related to an impact. Dolan, 317 Or. at 120, 854 P.2d at 443. The court below also states that this essential nexus can be found when the "exaction serves the same purpose that a denial of the permit would serve." Id. But, as in Nollan, the permit condition here cannot serve the same purpose that a development ban would achieve. The City of Tigard's purpose of acquiring a continuous and efficient bike path and greenway would not be realized by denying Dolan's land use proposal. How then would such continuous and efficient public facilities materialize? They do not exist now, and the only way the city can obtain its bike path and greenway without paying for them is to condition any land use proposal that happens to occur on the land upon which the bike path and greenway are planned. See Dolan, 317 Or. at 445-46 (Peterson, J., dissenting). The majority below does recognize that "[r]equiring an uncompensated conveyance of the easement outright would violate the Fourteenth Amendment," Dolan, 317 Or. at 118, 854 P.2d at 442, but that provides land owners little comfort when even the smallest and least intrusive land use proposals require governmental approvals and permits.

Finally, in support of its view that Nollan did not change the standard of review in these permit exaction cases, the Oregon Supreme Court cites to Park v. Watson, 716 F.2d 646, 653 (9th Cir. 1983). The court cites to Park v. Watson because this Court cited to Park v. Watson as the first case in a long string citation

of cases supporting this Court's view that its holding, i.e., that the easement exacted from the Nollans was not connected to any of the California Coastal Commission's professed purposes, was "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." Nollan, 483 U.S. at 839. But Park v. Watson and this Court's citation of it in Nollan does not stand for the proposition that Nollan requires only a rational nexus. This Court's citation of Park v. Watson comes, of course, after the Court noted that "[w]e can accept, for purposes of discussion, the Commission's proposed test as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailored standards." Nollan, 483 U.S. at 838. Thus, of course the holding in Nollan would be consistent with even those cases, such as Park v. Watson, employing a deferential standard of review to find an insufficient nexus to support a permit condition.

Even more telling, the Oregon Supreme Court fails to note that the string citation in Nollan, 483 U.S. at 839-40, that begins with Park v. Watson, 716 F.2d 646, also contains citations to cases requiring a much greater nexus than one supported by a mere rational basis. See e.g., Pioneer Trust & Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961).

Moreover, the Oregon Supreme Court's reliance on Park v. Watson, 716 F.2d 646, is misplaced because there the Ninth Circuit held that the condition in question violated the just compensation clause. The Ninth Circuit made a point to distinguish its review from the most deferential standard, which is used, historically at least, by the California state courts. Parks v. Watson, 716 F.2d at 653 (citing to Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 640-41, 484 P.2d 606, 611-13, appeal dismissed, 404 U.S. 878 (1971)); See also Grupe v. California Coastal Commission, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985) (upholding a permit condition requiring the dedication of an easement over two-thirds of a parcel that is

based on only an indirect nexus, with no benefit to the proposed single-family home).

We recognize that the takings clause may not require that land use exactions and fees be precisely tailored to the burdens and benefits attributable to the property being assessed. See, for example, the specifically and uniquely attributable test employed by some courts to evaluate impact fees. Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960); Pioneer Trust and Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970). That level of inquiry would approach judicial strict scrutiny of government's claimed nexus.[2] However, the decision below essentially equates the takings analysis with the extremely deferential nexus relationship historically used by the California state courts. This is the other extreme and should not be permitted. Also, the court below characterizes its standard of review as one based on the rational relationship test, which is typically used in a due process challenge. In takings jurisprudence, we find the deferential due process approach dangerous and insupportable in today's heavily regulated, yet still constitutional, society. The Nollan "substantial advancement" standard must require something between the deferential due process "rational basis" standard and the strict "specific and unique" relationship standard utilized by a few state courts. Otherwise, the more specific language of the takings clause would become redundant with the due process clause, and the Nollan opinion would become superfluous.

When the government requires a property owner to dedicate land there must be a direct, substantial and essential

[2] Cf. Plote, Inc. v. Minnesota Alden Co., 422 N.E.2d 231, 235-36 (Ill. App. Ct. 1981) ("[T]he Illinois Supreme Court is currently tending toward a more liberal interpretation of the validity of exaction ordinances while maintaining the requirements of proportionality and specific attributability.").

connection to the relevant burdens imposed on the community by the owner's particular proposed land use. This connection, which should maintain the essential elements of proportionality and specific attributability, must also be supported by at least substantial evidence on the record. Otherwise, the government exaction must be accompanied by just compensation. The Oregon Supreme Court's allowance of even the most untailored nexus to withstand constitutional scrutiny is too important a federal issue to go uncorrected by this Court and deserves plenary review.

II. THE QUESTION BEFORE THE COURT HAS BEEN DECIDED IN COMPLETELY INAPPOSITE WAYS BY LOWER COURTS AND CAN ONLY BE RESOLVED THROUGH FURTHER EXPLANATION BY THIS COURT

The "substantial advancement" standard for takings doctrine outlined in Nollan, 483 U.S. at 834 n.3, has been the subject of widely divergent interpretations by lower courts. The confusion and frustration caused by such disparity of constitutional philosophy across the country cries out for correction by this Court.

To help justify its view that Nollan did not change the standard of inquiry in a "substantial advancement" takings case, the court below states that it is "not alone in interpreting Nollan in this manner." Dolan, 317 Or. at 119, 854 P.2d at 443 (citing to Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992). The Ninth Circuit stated that it is "not persuaded that Nollan materially changes the level of scrutiny" that must be applied to the ordinance at issue. Commercial Builders, 941 F.2d at 874. The Ninth Circuit also asserted that "Nollan holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld." Commercial Builders, 914 F.2d at 875 (emphasis added). In other words, according to

the Ninth Circuit's reading of Nollan, only a scintilla of evidence is necessary to support a constitutional nexus. While we find the Ninth Circuit's reading of Nollan insupportable, the Oregon Supreme Court's reliance on it is even more remarkable because here there was not even a scintilla of evidence to support the city's generalized findings and assumptions about the impacts on the public caused by Dolan's proposed expansion of her business. Accord Balch Enterprises, Inc. v. New Haven Unified School District, 268 Cal. Rptr. 543 (Ct. App. 1990) (while following the extremely deferential standard of review used by the California courts, a school impact fee on commercial development was overturned because the school district did not provide any evidence to show that commercial development created the need for additional schools). There are other courts in line with the Oregon Supreme Court. See e.g., Holmdel Builders Association v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (conceptually approving the imposition of fees on commercial development for the purpose of providing affordable housing where such fees are based on a mere reasonable, or indirect and general, relationship between commercial development and the need for affordable residential development). Cf. Weatherly v. Town Plan and Zoning Commission of the Town of Fairfield, 579 A.2d 94, 98 (Conn. App. 1990), where the court, in neither citing Nollan nor reflecting any recognition of current exaction case law, upheld a dedication requirement based upon the following reasoning:

> Because the imposition of subdivision controls benefits the health, safety, morals and general welfare of the community, it is an exercise of the town's police power; . . . and as such does not require the exercise of the power of eminent domain. . . . Where reasonable and impartial, a commission's power to regulate the use of land does not constitute a taking without due process of law or just compensation.

This may have been the thinking in the earlier part of this century, but today, post Nollan, it is absolutely amazing.

However, of more importance to deciding whether this case deserves plenary review, the fact that the Oregon Supreme Court is not alone must be combined with the fact that it is completely inapposite to other courts that have considered the meaning of Nollan. See, for example, Seawall Associates v. City of New York, 542 N.E.2d 1059, 1068 (N.Y. 1989), in which the New York Court of Appeals stated that Nollan requires semi-strict or heightened scrutiny. Likewise, in Surfside Colony, Ltd. v. California Coastal Commission, 277 Cal. Rptr. 371, 377 (Ct. App. 1991) (footnotes omitted), the court held that "Nollan, however, changed the standard of constitutional review in takings cases. Whether the new standard be described as 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test . . . no longer controls." Cf. Castle Properties Co. v. Ackerson, 558 N.Y.S.2d 334 (N.Y. Sup. Ct. 1990) (right-of-way dedication requirement overturned in the absence of detailed evidence linking the development with the need for more right-of-way); William J. Jones Insurance Trust v. City of Fort Smith, Arkansas, 731 F.Supp. 912 (W.D.Ark. 1990) (right-of-way dedication requirement is a taking because city failed to show what incremental traffic change, if any, could reasonably be expected from a convenience store's proposed land use change); Board of Supervisors of West Marlborough Township v. Fiechter, 566 A.2d 370 (Pa. Commw. Ct. 1989) (right-of-way dedication requirement illegal because the record provided no evidence that the proposed development would produce the impacts requiring the dedication).

Leading authors are in line with the view that Nollan changed the standard of review to heightened scrutiny, higher than the rational relationship test employed by the Oregon Supreme Court below. Best, The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions, 10 Zoning & Plan. L. Rep. 153, 156 (1987); Falik & Shimko, The "Takings" Nexus -- The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California, 39 Hastings L. J. 359, 380-81 (1988); Minda, The Dilemmas of Property and Sovereignty in the Postmodern Era: The

Regulatory Taking Problem, 62 U. Colo. L. Rev. 599, 613 (1991); Peterson, Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches, 39 Hastings L. J. 335, 338 (1988); See also, Berger, Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases, 70 Neb. L. Rev. 186, 210 (1991) ("It was Justice Scalia's use of the language of intermediate heightened scrutiny, in connection with a takings analysis . . . that marks the importance of the Nollan case."); Daniel R. Mandelker, Land Use Law § 2.23 at 45 (2d ed. 1988) ("Nollan's most important holding is the heightened standard of judicial review it adopted."); Williams, Legal Discourse, Social Vision and The Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan, 59 U. Colo. L. Rev. 427, 465 (1988) ("Nollan's significance is that for the first time in nearly sixty years, a Supreme Court land use decision has trumpeted property as a fundamental right, entitled to a heightened standard of judicial review under the Constitution.").

Thus, lower courts have widely divergent opinions on when a fundamental provision of the federal Constitution requires the payment of compensation to private property owners, and the opinion of the Oregon Supreme Court below is blatantly against the greater weight of authority. This intolerable morass requires supervision. As presaged over two hundred years ago, the oversight of the federal Constitution's limitations on government power by independent courts from across the country can result in "a hydra in government from which nothing but contradiction and confusion can proceed." Alexander Hamilton, The Federalist Papers, No. 80, at 476 (C. Rossiter Ed. 1961). We ask the Court to help restrain the land use regulatory hydra by accepting the petition for review for plenary consideration.

III. THE CITY'S ACTIONS IN THIS CASE DEMONSTRATE A LOCAL LAND USE PRACTICE THAT CLAMORS FOR THIS COURT TO ADMONISH GOVERNMENTS THAT THEY MUST RESPECT INDIVIDUAL'S CONSTITUTIONAL RIGHTS WHEN REGULATING PRIVATE ACTIONS PURSUANT TO THEIR POLICE POWERS

It has been a long-standing governmental practice to demand land (e.g., development exactions and land dedications) or money (e.g., impact fees and fees in lieu of dedications) from property owners who propose to build on their land. See, for example, Bauman & Ethier, Development Exactions and Impact Fees: A Survey Of American Practices, 50 Law & Contemp. Problems 51 (1987), and authorities cited therein. But

> [t]he reach of subdivision exactions has significantly expanded over the years. What began as a means for preventing a subdivision from shifting to the municipality the responsibility for installing public improvements has been transmuted into a device by which municipalities are shifting to private land developers the cost of facilities and social programs for the general public that local governments can no longer afford.

Smith, From Subdivision Improvement Requirements To Community Benefit Assessments and Linkage Payments: A Brief History Of Land Development Exactions, 50 Law & Contemp. Problems 5, 28 (1987). In a national symposium on development exactions, Professor Babcock, the late dean of the American land use bar, cited examples of abusive exactions and followed with this discussion:

> In each of these cases one can imagine the initial reaction of the "extractee" - outrage.

In each case he surely went to his attorney and asked two questions: (1) How long will it take to get a final answer in court if we challenge this condition?; and (2) How much will it cost?

The answers probably were: (1) It will take three to four years, with the possibility of defeat; and (2) It will cost tens if not hundreds of thousands of dollars.

By the time the developer approaches his attorney, he has invested a large sum of front-end money and has a great deal of interest in obtaining a permit. Moreover, he wants the permit immediately. He takes out his pencil, does some calculating, and decides to pay up. This example is a classic illustration of what I call "municipal leverage."

Babcock, Foreword to Exactions: A Controversial New Source For Municipal Funds, 50 Law & Contemp. Problems 1, 2 (1987). See also Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L. Rev. 839, 841 (1983) ("[L]ocal governments cannot be trusted to deal fairly or carefully even in land decisions with only local consequences."); Taub, Exactions, Linkages, and Regulatory Takings: The Developer's Perspective, 20 The Urban Lawyer 515, 518 (1988) ("The fact that developers are willing to pay suggests the power of the local government's position, not the reasonableness of the exaction."). Consequently, many of the demands and exactions imposed on individuals by local governments go unchallenged.

Local governments are well aware of the amount of time, money and other resources that are invested in a land use proposal even before the first application for approval is submitted. Local governments are usually free to exercise their municipal leverage to extract all types of property interests and money from project applicants. And when challenged, only

occasionally will courts scrutinize the exercise of this municipal leverage in ringing terms. See e.g., Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) (Land dedication "far out of proportion to the needs created by his subdivision . . . [amounts to] . . . grand theft."); J.E.D. Associates, Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981) (Land dedication and fee in lieu of dedication "appears to us to be an out-and-out plan of extortion."), overruled on other grounds, Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988); see also Nollan, 483 U.S. at 837 (easement condition amounts to extortion). As difficult as a takings challenge is for the property owner, the just compensation clause should remain a fundamental crutch to support the property owner in fighting the heavy-handed leverage brought to the table by the municipality. The Oregon Supreme Court's opinion below fatally damages this constitutional crutch.

These amici do not mean to suggest that all local governments -- counties, cities and towns -- are ruthless and unreasonable in conducting the affairs of their daily land use decision making processes. Many, if not most, local governments are reasonable and sincere in their efforts to promote the public's health, safety and welfare. But while it is our view that too many communities do not respect constitutional considerations for the sake of political or financial expediency, if only one community forsakes one of its citizen's rights, the constitutional damage is done and we are all worse off because of it. And that damage is exponentially magnified by judicial acceptance of it. It is exactly because of these situations that constitutional doctrine must be developed to protect individual rights, including property rights. The courts must step in to correct the constitutional damage and restore fairness and justice to land use regulatory systems. For these amici's members, we have had enough abuse. We thought we obtained some relief with Nollan's dictates but decisions like those below point out, again, that important individual freedoms that run counter to the majority's wishes are the most evanescent of all. The types of unconstitutional permit conditions involved in this case cannot continue to crush forward. The role of the courts is to define

when the government has gone too far and insure that adequate remedies exist to redress the individual's loss. The Oregon Supreme Court failed to exercise its duty of supervision in the conflict between the public's interest and the private property owner's rights.

While the takings clause in general does not act to prohibit transfers of wealth deemed appropriate by the majoritarian branches of government, courts ought to be suspicious of governmental actions that affect a narrow class of individuals as such actions can be taken without the usual political constraints. Justice Scalia recognized this danger in Pennell v. City of San Jose, 485 U.S. 1, 21-23 (1988) (Scalia, J., dissenting). Thus, when wealth is exacted from a narrow class of individuals, as here, the takings clause should wield its power to limit governmental actions.

This Court warned that it would be particularly careful about the adjective "substantial" in the substantial advancement takings test where "the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." Nollan, 483 U.S. at 841. "It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed." Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting).

The Court has noted that

> many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to

> warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S., at 416.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321- 22 (1987). The context of the present case is a perfect vehicle within which the Court may elaborate on and reaffirm these just compensation clause principles.

CONCLUSION

For the reasons stated above and in the Petition for Certiorari, this Court is urged to issue a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court.

Respectfully Submitted,

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November 4, 1993

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No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Petition For Writ Of Certiorari
To The Oregon Supreme Court

MOTION AND BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE ALLIANCE FOR AMERICA, AND THE FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION, THE ALLIANCE FOR AMERICA, AND THE FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF PETITIONER

Amici respectfully petition to file the annexed brief *amici curiae* pursuant to Supreme Court Rule 37. Counsel for Petitioner has given their consent for the filing of an *amici* brief. However, Counsel for Respondent has denied granting consent. A copy of Petitioner's consent has been provided to the Clerk of the Court.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation (MSLF) is a non-profit, public interest law foundation organized pursuant to the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, a limited and accountable government, and the free enterprise system.

The Alliance for America is a fifty state network of nearly five hundred independent grassroots organizations whose collective membership numbers in the millions. These groups represent a variety of vocational, cultural, and political interests including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, private property protection, local government and various community and regional organizations. The Alliance was formed in 1991, and is intent on curbing excessive governmental regulation and the violation of constitutionally protected property rights resulting in family and community despair.

The Fairness to Land Owners Committee (FLOC) is a Maryland-based, national organization with over 13,000 members who are property owners faced with confiscatory land-use regulations involving a number of federal and state statutes. FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's own land, and is active in educating the public and lawmakers about the difference between conservation and confiscation.

Amici will present a broader perspective on the issues presented in this case which will assist this Court in

concluding the necessity for review. *Amici*'s interests in the outcome of this lawsuit are tied directly to their members' private property rights. *Amici* have serious concerns that the ruling of the Oregon Supreme Court does violence to precedents written by this Court, which recognize the constitutional vitality of private property rights.

WHEREFORE, *Amici* respectfully request the permission of this Court to participate in this case as *amici curiae* and to file the attached brief *amici curiae* in support of Petitioner.

Respectfully submitted,

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November 4, 1993

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BRIEF *AMICI CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION, THE ALLIANCE FOR AMERICA, AND THE FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF PETITIONER

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amici curiae* in support of Florence Dolan, the Petitioner for *certiorari*.[1]

[1] *Amici* have obtained the written consent of Petitioner. The written consent of Petitioner has been provided to the Clerk of the Court. Respondent has declined to give consent. In accordance with Supreme Court Rule 37, a Motion For Leave To File Brief *Amici Curiae* is provided herewith.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

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Amici's interests in the outcome of this lawsuit are directly tied to their members' private property rights.

Amici have serious concerns that the ruling of the Oregon Supreme Court does violence to precedents written by this Court which recognize the constitutional vitality of private property rights.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amici curiae hereby adopt Petitioner's statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case.

SUMMARY OF THE ARGUMENT

Amici acknowledge that Petitioner does not challenge Respondent's land use regulations generally. Petitioner does, however, challenge the exactions imposed upon her by Respondent as a condition to receiving a development permit for her property.

The Oregon Supreme Court erred in dismissing Petitioner's claims under the Fifth and Fourteenth Amendments to the United States Constitution for the taking of her property and the violation of her due process rights. Further, the decision of the Oregon Supreme Court is in direct conflict with decisions of this Court with respect to three important federal questions concerning the extent to which persons acting under color of law may interfere with, impair, or take property rights.

This Court should not allow the Respondent, and other governmental bodies, to avoid their mandatory

duty to compensate landowners whose property is put to public use. Indeed, it is only of recent vintage (and dwindling public fiscs) that governmental bodies have sought, in the name of environmental protection, to circumvent their eminent domain powers without regard to the property owners' Fifth Amendment rights, and take an individual's property via confiscatory actions, such as the action present in this case.

REASONS FOR GRANTING THE WRIT

A. The Character Of The Governmental Action In This Case Is Confiscatory In Nature Because It Ousts An Owner From Her Property In A Way Customarily Achieved Through Eminent Domain Proceedings.

This Court has established, as a basic tenet of land use jurisprudence, that certain rights are fundamental to the concept of private property. Among those fundamental rights are the right to absolute and exclusive ownership and possession of property, and the right to evidence such exclusive ownership and possession by excluding others from one's property. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). To the extent that government agencies or persons acting under color of law deprive a property owner of the right to exclude others, this Court has declared such acts to be a deprivation of those fundamental rights and a taking of a property interest under the Fifth and Fourteenth Amendments to the United States Constitution, irrespective of the extent of the occupation or the identity of the interloper. *Id.*

Contrary to the clear and unambiguous decisions of this Court, the Oregon Supreme Court has determined that, by simply applying for a development permit and seeking the "benefit" of the permit process, Petitioner has, as a matter of law, waived her constitutionally-protected property rights. Moreover, in its decision, the Oregon Supreme Court has established, as a rule of law, that a land use regulation which requires a property owner to submit to the continued physical occupation of his or her property as a condition to obtaining a land use permit does not result in the taking of the owner's property or the deprivation of the owner's fundamental right to absolute and exclusive ownership and possession of the property. The decision of the Oregon Supreme Court does such violence to settled law, as expressed in the precedent decisions of this Court, that it must be reversed.

1. The Act Of Applying For A Land Use Permit Does Not, In And Of Itself, Require Petitioner To Surrender To Respondent Her Constitutionally-Protected Right To Exclude Others From Her Property.

According to the hypothesis advanced by the Oregon Supreme Court, property owners must be prepared to surrender their property rights for the privilege of seeking a land use permit. As the Oregon Supreme Court held: "Petitioners may avoid physical occupation of their land by withdrawing their application for a development permit." Petitioner's App. A-11 n.8.

Contrary to the conclusion of the Oregon Supreme Court, this Court has determined that the submission of a

permit application does not, as a matter of law, constitute a waiver by the property owner of her important and fundamental property rights. The "voluntary relinquishment" theory advocated by Respondent, and upon which the Oregon Supreme Court erroneously based its decision, was rejected by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In response to Teleprompter's suggestion that the law requiring residential landlords to submit to cable installations was "simply a permissible regulation of the use of real property," *id.* at 438, this Court held that the right of a property owner to make otherwise-lawfully use of his or her property "may not be conditioned on his forfeiting the right to compensation for a physical occupation. . . . The right of a property owner to exclude a stranger's physical occupation of his land may not be so easily manipulated." *Loretto*, 458 U.S. at 439 n.17.

The Oregon Supreme Court advances what might be characterized as an "additive" theory of land use regulation, that is, that government "adds to" property rights by granting permits to property owners for development of their property. However, the proposition that an applicant for a land use permit is seeking a "benefit" from the government, and that, as a condition of conferring such a benefit, the government can thus exact from the applicant any concession which the government deems to be in the public interest, was expressly rejected by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). In *Nollan*, this Court stated:

> [T]he right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as [a] voluntary "exchange."

Nollan, 483 U.S. at 833 n.2.

Upon review of this case, the Oregon Supreme Court undertook an extensive analysis of this Court's decision in *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992). However, *Yee* is clearly distinguishable and further, is not applicable to the facts of this case.[2] This Court, in reaching the conclusions which distinguish *Yee* from *Loretto* and *Nollan*, relied upon the fact that, by engaging in the mobile home rental business, the Yees were presumed to have voluntarily submitted themselves to the reasonable regulation of the mobile home rental business, including the rent control provisions of the Mobile Home Residency Law. This Court observed, however, that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner, over objection, to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 112 S.Ct. at 1528. That is the present case.

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[2] The Oregon Supreme Court declined to distinguish the facts of this case from *Loretto* and *Nollan*, and chose instead to base its analysis on *Yee v. City of Escondido*. *Yee*, however, is readily distinguishable from this case on its facts; the Yees *chose* to engage in the mobile home park rental business and, therefore, became subject to the reasonable regulation of that business by the City of Escondido. Petitioner has no more elected to engage in the pedestrian and bicycle recreational business than Mrs. Loretto was in the television business, or the Nollans were in the business of providing accommodations to beach walkers.

Yet, the Oregon Supreme Court has adopted a construction of *Yee* that deprives all meaning and vitality from this Court's *Loretto* decision governing *per se* takings for permanent physical occupations of private property.

Amici acknowledge the authority of Respondent to regulate the use and development of Petitioner's property under the provisions of state and local land use laws. However, Respondent and the Oregon Supreme Court "go too far" when they allow the taking of Petitioner's fundamental property rights in the guise of a land use permitting scheme. This Court cannot let stand a decision by a State Supreme Court which grants to permitting authorities a license to demand the surrender of fundamental property rights whenever the property owner has the misfortune to fall within the jurisdiction of the multitude of federal, state and local permitting programs.

The conflict between the decision of the Oregon Supreme Court and the clear statements of constitutional law expressed by the decisions of this Court underscores the need for this Court to restate and clarify the protection which it has previously afforded to the fundamental rights of property owners in the land use permitting process. If the decision of the Oregon Supreme Court is allowed to stand, there may as well appear over the doorways of the offices of zoning administrators and land use regulators throughout the country:

Lasciate ogni speranza, voi ch' entrate[3]

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[3] "All hope abandon, ye who enter in." Dante: *The Divine Comedy, "Inferno"* III. ix.

2. Respondent's Deprivation Of Petitioner's Right To Exclude Others From Petitioner's Property, Is A Taking By Respondent Of Petitioner's Fundamental Property Rights And Gives Rise To Both A Substantive Due Process Claim And A Taking Claim Under The Fifth And Fourteenth Amendments Of The Constitution.

The decision of the Oregon Supreme Court is in direct conflict with the recent decisions of this Court. These decisions confirm that the right to exclude others from one's property is a right so fundamental to our notion of private property that any interference with that right by government, or by persons acting under color of State law, is a taking, regardless of the degree of the interference, the economic effect of the interference, the extent of other rights retained by the property owner, or the benefits which might be derived by the public as a result of such interference.

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court held that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation." *Id.* at 179-80. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court emphasized that "when the 'character of the governmental action' is a permanent physical occupation of property, our cases have uniformly found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35 (footnote and citation omitted).

Although in *Loretto*, this Court recognized the "broad power [of the States] to regulate housing conditions in general and the landlord-tenant relationship in particular," *Loretto*, 458 U.S. at 440, the Court also recognized the distinction between rent control cases (such as *Yee*) and physical occupation cases. "In none of [the housing regulation] cases however, did the government *authorize the permanent occupation of the landlord's property by a third party.*" *Id.* at 440 (emphasis added).

Equally compelling and even more relevant to Petitioner's position is *Nollan*, in which this Court stated:

> [t]he right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property." In *Loretto* we observed that where governmental action results in "[a] permanent physical occupation" of the property by the government, itself or by others, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises. (Citations omitted.)

Nollan, 483 U.S. at 831-32.

This Court, in *Nollan*, reaffirmed its rationale in *Loretto* by stating "our cases universally have found a

taking to the extent of the occupation, *without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.*" *Nollan*, 483 U.S. at 831-32 (quoting *Loretto*, 458 U.S. at 434-35) (emphasis added). One need only compare the limited extent of the "physical invasions" held to be a sufficiently intrusive infringement upon the fundamental rights of the property owners in *Loretto* and *Nollan* with the forced occupation of a significant part of Petitioner's property by the City's bicycle and pedestrian pathway, to conclude that a significantly greater invasion of Petitioner's property has occurred than the Court found to be constitutionally offensive in *Loretto* and *Nollan*.[4]

In this case, the Oregon Supreme Court has decided an important federal question of fundamental property rights in a manner in clear conflict with the applicable decisions of this Court.[5] *Amici* strongly believe that it is

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[4] The right to exclude "others" from one's property is not limited to television cable or beach walkers. In *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), the Court of Appeals for the Ninth Circuit found that it was constitutionally permissible to prevent the plaintiffs from shooting endangered grizzly bears which had been killing plaintiffs' sheep. *Id.* at 1331. Nevertheless, the Court recognized that regulations were within constitutional limits because they "do not forbid plaintiffs from personally defending their property by means other than killing grizzly bears." *Id.*, including the fencing of the property to exclude the bears. Justice White, in his dissent to the Court's denial of *certiorari* in *Christy v. Lujan*, 490 U.S. 1114 (1989), observed that "perhaps a government edict barring one from resisting the loss of his property is the constitutional equivalent of an edict taking such property in the first place." 490 U.S. at 1115.

[5] The Oregon Supreme Court held that the exactions were permissible based upon a "reasonable" nexus theory and not

important, both to protect the rights of Petitioner and to secure the fundamental rights of all property owners from unwarranted incursions by government regulatory agencies, that this Court settle the questions raised by this Petition. This Court's decisions in *Loretto* and *Nollan* clearly establish that it is the *fact* of the forced permanent physical invasion, not the *degree* of the invasion or the identity of the interlopers which is the determining factor. The decision of the Oregon Supreme Court is inconsistent and irreconcilable with the principles of fundamental property rights established by this Court in *Loretto* and *Nollan*. If allowed to stand, the decision of the Oregon Supreme Court will cast tremendous doubt upon the soundness of this Court's decisions.

B. The Transfer Of Rights In Petitioner's Property Does Not Substantially Advance A Legitimate Governmental Interest And Thus Constitutes A Taking.

A statute takes property if it does not *substantially* advance legitimate state interests. *Nollan*, 483 U.S. 825,

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this Court's "substantial" nexus requirement. The Oregon Supreme Court stated that the Respondent's findings justified the greenway exaction by determining that additional storm water runoff, resulting not only from Petitioner's development, but also from "elsewhere within the Fanno Creek drainage basin, is *expected* to increase flow within the creek." The findings also purportedly justified the pedestrian and bicycle pathway dedications because they were "*reasonably related* to the applicant's request to intensify development of this site" because it was "*reasonable to assume* that customers and employees of the future uses of this property *could* utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." Petitioner's App. A-24.

834 n.3 (1987). *Nollan* held that California's imposition of an easement upon the Nollan's property had little connection with the justifications advanced for the exaction. Without adequate ends and means, the Court reasoned, the purpose became "quite simply, the obtaining of an easement . . . but without payment of compensation." *Id.* at 837.

Amici believe that this case strongly illustrates the dangers of allowing lower courts to relax the constitutionally required standard governing the degree of scrutiny in takings and exactions cases. The Oregon Supreme Court's decision unconstitutionally permits cities to extort public improvements, planned and codified in master plans, by exacting those improvements from landowners seeking to develop their properties, merely because their properties are in proximity to the sites planned for improvement. This amounts to nothing less than calculated extortion.[6]

This Court stressed in *Nollan* that the nexus requirement is more stringent than its counterpart under the

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[6] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (the question "at bottom" in a takings case is "upon whom the loss of the changes desired should fall"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (takings clause is "designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole," (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987) (the government cannot "single [] out 'individuals' to bear the burden of [its] attempt to remedy" public problems).

Equal Protection Clause. *Id.* at 835 n.3. More is required than a plausible reason:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination . . . [o]ur cases describe the condition for abridgment of property rights through the police power as to a "*substantial* advanc[ing]" of a legitimate state interest.

Id. at 841 (emphasis in original). Measured by these standards, the Respondent's permit exaction cannot pass constitutional muster.[7] Evidence of an exaction substantially furthering a legitimate governmental interest must be reasonable in nature, credible, and of solid value.

Justice Peterson, dissenting from the Oregon Supreme Court's opinion, described the inadequacy of the Respondent's findings. As an example, Justice Peterson describes the justification of the dedication for the greenway and storm drainage: "[A]ll these findings establish is that there will be some increase in the amount of storm water runoff from the site. A thimbleful? The Constitution requires more than that." (Peterson, J., dissenting). Petitioner's App. A-26. Given the undisputed fact that the Respondent prepared no site specific studies to substantiate its findings, the Oregon Supreme Court is

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[7] The insistence upon a nexus between the end sought and the means used is a variant of the harms test. Not having caused the harm, Mrs. Dolan is now asked to underwrite alleged problems which are not a consequence of her conduct. *See Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

simply licensing extortionate behavior which enables the Respondent to obtain its true public goals: (1) obtaining a greenway to further the objectives of the *Master Drainage Plan* and; (2) to provide for the physical relocation and expansion of the Fanno Creek channel to accommodate stormwater runoff from other additional development projects in the drainage basin.

The City's argument, in support of its case, amounts to an assertion that the courts are obligated to accept any proffered justification of a statute at face value, no matter how tenuous its logic or dubious its assumptions.[8] If that were the law, there would be no point in pretending to have a constitutional protection against irrational and arbitrary laws, for there is no possible enactment that cannot be *somehow* argued to support some legitimate purpose, if the logic of that argument is deemed to be entirely immune from any judicial scrutiny.

In short, whereas the California Coastal Commission in *Nollan* was properly characterized by this Court as engaging in an "out-and-out plan of extortion," by

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[8] As Jeremy Bentham put it:

> In a state of things like this, what could be more natural than that, by a people infants as yet in reason, giants in passion, every distinguishable feature of a system of procedure directed to such ends should be condemned in the lump, should be involved in one undistinguishable mass of odium and abhorrence; more especially any particular instrument or feature, from which the system was seen to operate with a particular degree of efficiency towards such abominable ends. . . .

The Works of Jeremy Bentham, ed. John Bowring (Edinburgh, 1843), VII, 456.

demanding that the owners provide a public easement as a condition for rebuilding their home, *Nollan* at 837, the City of Tigard, in this case, has brazenly gone much further and engaged in what could be aptly called an out-and-out plan of confiscation.

C. By Requiring A Significant Area Of Petitioner's Property To Be Left As A Public Open Space And Recreational Area As A Condition Precedent To Permitting The Development Of Any Other Portion Of Petitioner's Property, Respondent Has Denied Petitioner All Productive Or Economic Use Of That Portion Of Her Property, Without Compensation.

While there remains some question as to the economic effect of the development limitations imposed by Respondent on the "other areas" of the Petitioner's property, the decision of the Oregon Supreme Court leaves no doubt that, in its view, Petitioner can be compelled by Respondent to dedicate her property to a public purpose as a condition of development of any other area of Petitioner's property. Accordingly, it would appear, under the reasoning of this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed.2d 798 (1992), that Respondent has, under color of State law, taken all beneficial use of the exacted portion of Petitioner's property.

The Court's pronouncement in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated," *Penn Central*, 438 U.S. 104, 130 (1978), thus must be reexamined in light of this Court's decision in *Lucas*. There is a

compelling need for this Court to finally determine the extent to which a taking has occurred when government action deprives a property owner of all value of a portion of his or her property.

In *Lucas*, the Court noted that the issue of whether a taking has occurred, with respect to the parcel as a whole or the burdened portion of the parcel, was unsettled and that it was unclear "whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." *Lucas*, 120 L.Ed.2d at 813 n.7. The Court recognized that "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured . . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court." *Id.*

The facts in *Lucas* did not afford this Court an opportunity to address the inconsistencies resulting from this Court's formulation in *Penn Central* because in *Lucas*, the development restriction which required that the land be left in its natural state applied to the entire property. *Id.* at 4883. In this case, however, Respondent's actions prohibit the development of any portion of the Petitioner's property unless a significant area is dedicated for the City's purpose. Thus, under the Court's decision in *Lucas*, Respondent has accomplished a complete taking of that portion of Petitioner's property. It remains to be answered by this Court whether it will recognize that a

taking has occurred when a significant portion of Petitioner's property has been left "without economically beneficial or productive options for its use." *Lucas*, 120 L.Ed.2d at 814.

The decision of the Oregon Supreme Court, if allowed to stand, will encourage government agencies to view the dedication of open space on private land by regulation as an attractive, practical and inexpensive alternative to "the use of the many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitude on private scenic lands preventing development uses, or to acquire such lands altogether." *Lucas*, 120 L.Ed.2d at 815. In granting this Petition, this Court will thus be afforded an opportunity to resolve one of the most confusing, contentious and unsettled questions in takings jurisprudence.

CONCLUSION

For the foregoing reasons, a *writ* of *certiorari* should be issued to review the judgment and opinion of the Oregon Supreme Court, and that the decision below be reversed, or in the alternative, the decision below be summarily vacated and the case remanded for adequate consideration below.

Respectfully submitted,

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November 4, 1993

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No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oregon

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF OREGON ASSOCIATION OF REALTORS IN SUPPORT OF PETITIONER FLORENCE DOLAN

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Pursuant to Supreme Court Rule 37, the Oregon Association of Realtors respectfully moves for leave to file the attached amicus curiae brief in support of petitioner, Florence Dolan. Counsel for petitioner has consented to the filing of this brief and such consent has been lodged with the Clerk of this Court. Respondent City of Tigard has refused to consent to the filing of this brief. Therefore, amicus files this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Oregon Association of Realtors is a nonprofit, professional association of commercial and residential realtors in the state of Oregon with approximately 12,000 members. The Association and its members have been involved in litigation at various times in support of individuals' rights in property. Amicus and its members are deeply concerned about the extent to which government may legally restrict the use of land. Real property is the substance of its members' business and "[t]he substantial value of property lies in its use." *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 409, 348 P.2d 664, 669 (1960). Conditions imposed on use, therefore, influence the marketability of land.

Members of the Oregon Association of Realtors advise the public on the attributes of land affecting its value. The Oregon Supreme Court's decision in this case allows government to attach conditions to otherwise permitted uses of property based on speculative impacts the government might imagine could result from proposed uses of property. The value of property depends on a number of interdependent factors, particularly including the extent to which government can impose conditions, especially exactions, on uses. If conditions can be imposed on the basis of conjecture

and without proof as allowed by the Oregon Supreme Court, property values will become more unstable than what naturally occurs in the market and will leave people with greater uncertainty and risk. The Oregon Association of Realtors' concern and experience with these issues will amplify the argument presented in the pending Petition for Writ of Certiorari.

Counsel for amicus has briefed the issues in this case to the Oregon Supreme Court on behalf of another amicus curiae and, therefore, is familiar with the issues and the scope of their presentation. Counsel for amicus has also participated in numerous cases in federal and state courts involving conflicts between property regulation and the Constitution. Amicus seeks to file the attached brief to explain and demonstrate the broad interest in the pending Petition for Writ of Certiorari and its concern over the confused status of the law regarding the essential feature of its members' livelihood: land and the rights inherent in land.

The Oregon Association of Realtors, therefore, respectfully requests the Court to grant this motion for leave to file the attached amicus curiae brief.

DATED: November, 1993

Respectfully submitted,

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AMICUS CURIAE BRIEF OF OREGON ASSOCIATION OF REALTORS IN SUPPORT OF FLORENCE DOLAN'S PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Where a permit exaction is challenged as a taking, does *Nollan* require a "substantially related" degree of judicial scrutiny of the exaction and its "essential nexus" to the impacts of a proposed development, rather than the "reasonably related" degree of scrutiny used by the Oregon Supreme Court?

2. Where a permit exaction is challenged as a taking, did the Oregon Supreme Court err in holding that a legally sufficient nexus exists when the local government makes findings that its imposed exactions are reasonably related to the increased intensity in use of the subject property, even though those findings are at best merely *ipse dixit*, and at worst demonstrate only a potential increase in intensity of use, rather than a bona fide impact directly caused by the development?

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IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of amicus curiae is set forth in the preceding motion. Amicus curiae adopts that explanation of its identity and interest herein.

OPINION BELOW

The opinion of the Oregon Supreme Court is reported as *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993), and is reproduced in Appendix A to the Petition for Writ

of Certiorari to the Oregon Supreme Court (hereinafter Appendix).

STATEMENT OF THE CASE

Petitioner, Florence Dolan, is the owner of commercially zoned land in the City of Tigard, Oregon, on which a retail electric and plumbing supply store is operated. Mrs. Dolan and her now late husband sought approval to raze the existing 9700 square foot building and replace it with a larger, 17,600 square foot building. Appendix D-3. The City was willing to grant permission for that new construction only if the Dolans would dedicate to the City two pieces of property. One is the entire portion of their lot which lies within the 100-year floodplain for use by the City as a part of a system of recreational greenways connected to Fanno Creek Park, a park owned and operated by the City. The other required dedication is an additional 15 feet along the greenway, above the 100-year floodplain, for future reconstruction of a storm drainage channel and for a pedestrian and bicycle pathway. The Dolans were also required to construct the pathway itself. Appendix D-6.

The Dolans sought a variance from these conditions on the grounds that their imposition constituted a taking of their property in violation of the Fifth and Fourteenth Amendments. The City denied the variance requests because a variance "would conflict with the City's adopted policy of providing a continuous pathway system intended to serve the general public good." Appendix G-26. Similarly, in regard to the greenway, the City decided that "[n]ot requiring dedication of this area as a

condition of development approval, as the applicant's variance proposal requests, would clearly conflict with the purposes and policies of the Comprehensive Plan, Community Development Code, and the City's *Master Drainage Plan*." Appendix G-39.

The Dolans then sought review in the Oregon Land Use Board of Appeals (LUBA), which has exclusive jurisdiction over all challenges to land use decisions, including those based on constitutional grounds. ORS 197.825(1) and 197.828(2)(c)(B). LUBA, and then the Oregon Court of Appeals, rejected the Dolans' constitutional claim.

On review, the Oregon Supreme Court affirmed the Court of Appeals' decision. Specifically, the Oregon Supreme Court ruled that the City need only show a "reasonable relationship" between the conditions and the impacts of the Dolans' proposed development. Appendix A-13. According to the Oregon court, such relationship was shown in the City's findings when it concluded that the bicycle pathway would serve the transportational and recreational needs of the employees and customers of the business located in the Dolans' larger building. Appendix A-16. A reasonable relationship was also established in the view of the Oregon Supreme Court for the floodplain dedication because the larger building would increase the parcel's impervious surface area and, therefore, increase storm water runoff. Appendix A-17. Justice Peterson filed a dissenting opinion. Appendix A-23.

Having been unsuccessful in her attempts to obtain relief from the Oregon courts, Mrs. Dolan has filed the pending Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Rule 10 of the Supreme Court identifies factors the Court deems important to determining whether a petition for a writ of certiorari should be granted. Two sections of Rule 10.1 are applicable here.

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

Rule 10.1.(b).

> When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 10.1.(c). Each of these factors call for the granting of the petition in this case.

I

THE OREGON SUPREME COURT HAS DECIDED FOR FIFTH AMENDMENT PURPOSES THAT THE NATURE OF JUDICIAL REVIEW OF CONDITIONS IMPOSED ON THE USE OF PROPERTY IS SEVERELY LIMITED IN CONFLICT WITH THIS COURT'S DECISION IN *NOLLAN V. CALIFORNIA COASTAL COMMISSION*

The central question of this case concerns how the Constitution requires courts to examine conditions attached to permits to use privately owned property. This Court settled some of those issues in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In *Nollan*, this

Court reviewed a permit to replace an existing beach front dwelling with a larger home on the condition that the owners dedicate an easement for public access along their privately owned beach. The Court concluded that such a condition violated the Takings Clause of the Fifth and Fourteenth Amendments because the condition failed to substantially advance a legitimate government interest. *Nollan*, 483 U.S. at 835 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

This Court in *Nollan* recognized that requiring the easement outright would have constituted a taking of property since an easement is an interest in land and the resulting physical invasion of land has long been considered a taking of property. 483 U.S. at 831-32 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The question in *Nollan* was whether a taking occurred when such a dedication was required only as a condition attached to a land-use permit. The same question is at issue in the present case.

In *Nollan*, this Court developed a two-stepped approach. First, the government must have the authority to deny the permit altogether. Then and only then, can the government lift the ban and grant the permit subject to a "condition which serves the same legitimate police-power purpose as a refusal to issue the permit." 483 U.S. at 836. Any attempt to acquire more than that which would mitigate harms caused by the proposal would constitute a form of " 'extortion.' " *Id.* at 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). Conditions not designed to resolve actual public burdens caused by the proposal would result in a "leveraging of the police power" whereby

unnecessarily strict land use controls are adopted for the purpose of bargaining them away for something the government really wants, but cannot take directly without paying compensation. *Nollan*, 483 U.S. 837 n.5.

The Oregon Supreme Court never evaluated whether the City of Tigard could have denied the Dolans' permit on the basis that the larger building would have created too great a burden on bicycle traffic or storm water drainage or recreational "greenway" needs. It is highly suspect that such a denial would have been proper. After all, the City found that the Dolans' "use is permitted outright in the CBD (Central Business District) zone." Appendix G-16. Unfortunately for the Dolans, the property was also located in and adjacent to the 100-year floodplain which the City had marked out as its *quid pro quo* for any new development. Hence, the first step in the analysis required under *Nollan* was not taken.

The second step of comparing the condition to the basis for an outright denial was taken in a faulty manner. This Court explained the problem with allowing government to condition property usage on exactions which are not directly tied to an impact which would justify an absolute prohibition.

> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but

> granted dispensations to those willing to contribute $100 to the state treasury. . . . The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.

Id. at 837.

Critical to this analysis is the question of the level, scope, or nature of judicial review of the condition itself and the harm the condition must alleviate in order to be valid. May the harm be hypothetical? May it be one which is reasonable to assume will or might result from the proposed use? Is there no need to proportion the extent of the condition to the extent of the harm? While these questions may not have been completely answered, one would expect that this Court gave sufficient guidance in *Nollan* for courts to know that imaginary, hypothetical or merely assumable impacts are insufficient. Neither can a minimal impact be used to insist on a major contribution to the City.

First, *Nollan* made clear that in order for a condition to be imposed on the use of private property, the government must do more than merely assert that the condition is legitimate in a conclusory fashion. While the dissent in *Nollan* argued that the Coastal Commission could easily demonstrate a connection between the building of a larger home and the easement exaction, the majority rejected that claim by stating the Fifth Amendment requires more than merely reciting talismanic findings. Specifically, this Court stated:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement,

> and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police power objective.

Nollan, 483 U.S. at 841 (emphasis in original).

Second, the Court's discussion and contrast of the Takings Clause with the rational basis test of the Due Process Clause mandates that courts not attempt to justify conditions to alleviate hypothetical burdens or ones which may be "assumed."

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved. *Agins v. City of Tiburon*, 447 U.S. 255, 260, . . . not that "the State *'could rationally have decided'* that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.3 (quoting 483 U.S. at 843 (Brennan, J., dissenting) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981))). Hence, because a specific protection of the Constitution is at stake, namely

the Takings Clause, this Court required more than the speculative, hypothetical, or assumable justification often allowed under the rational basis test of substantive due process.

This is where the Oregon Supreme Court took an unmistakable departure from this Court's precedent. The Oregon court used hypothetical or "assumable" burdens to be the ones which supposedly justify the demand that Mrs. Dolan give up some of her property. These are the City's critical "findings."

> "It is reasonable to **assume** that customers and employees of the future uses of this site **could** utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and **recreational needs**.
>
> In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to **expect** that some of the users of the bicycle parking provided by the site plan will use the pathway adjacent to Fanno Creek if it is constructed.

Appendix G-24 (emphasis added). Of course, the rack was required by the City. Appendix G-21.

The City did not prove anything about the Dolans' proposal. (In fact, it placed the burden on the Dolans to prove that the taking of property was unconstitutional. Appendix G-7, G-40.) Nevertheless, the City merely concluded that it could assume that some employees or customers of the plumbing business might use the pathway. Of course, they may also visit other facilities operated by the City of Tigard as well. Under the Oregon

Supreme Court's analysis there is no reason Mrs. Dolan or people like her could not be singled out to provide a wide array of resources to potential customers of the electrical and plumbing supply store.

There is nothing in the City's "findings" to quantify the increased need for bicycle paths occasioned by increasing the plumbing store's size, if any need will occur at all. As noted by dissenting Justice Peterson, it appears that the City is more concerned about having an uninterrupted pathway than with making sure that those who create the "need" for the pathway, pay for it. Appendix A-23. A similar argument was made and rejected in *Nollan*, 483 U.S. at 841.

The City's "findings" to support the dedication of the floodplain for the greenway fare no better.

> [T]he Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site thereby increasing the site's impervious area. The increased impervious surface would be **expected** to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation.

Appendix G-37 (emphasis added).

As explained by dissenting Justice Peterson, there is no identification of how much storm water runoff will increase – perhaps a "thimbleful." Appendix A-26. Similarly, demanding the dedication of property within the 100-year floodplain for storm water purposes while at the

same time requiring a dedication of land **outside** the 100-year floodplain for reconstruction of a flood control channel suggests that the City is interested in something other than storm drainage for the floodplain. Appendix at G-42. The real reason for requiring the dedication of land within the floodplain has nothing to do with storm water, but on the reasons explained in the City's ordinance itself: recreation. *See* Appendix G-42. While the plans for community recreational facilities may be legitimate, the plan to acquire the land by holding Mrs. Dolan's permit hostage is not.

As to the nature of the "fit" between the condition and the public burden the condition is supposedly designed to alleviate, the Court in *Nollan* accepted the California Coastal Commission's claim that the condition need only be "reasonably related." 483 U.S. at 838. However, this Court did not rule a "reasonably related" test was the standard. The Court accepted such language only "for purposes of discussion" because the California Coastal Commission was unable to prove that the condition was even reasonably related to any public harm. 483 U.S. at 838.

It was at this point this Court cited a list of cases indicating that conditions on the use of property which are not reasonably related to a public burden that would justify a total prohibition constitute a taking of property. The first in the list was *Parks v. Watson*, 716 F.2d 646, 651-53 (9th Cir. 1983), *cited in Nollan*, 483 U.S. at 839. The Oregon Supreme Court relied heavily on the *Nollan* decision's citation of *Parks* and concluded that "reasonably related" must be the test. Appendix A-12.

However, the Oregon Supreme Court failed to realize that *Parks*, like *Nollan*, involved a condition which had no connection to the proposal and, therefore, could not survive even the most "untailored" standards. *Nollan*, 483 U.S. at 838. In *Parks*, the property owner was told that the city would vacate platted streets only if the owner gave to the city his geothermal wells. 716 F.2d at 649. The Ninth Circuit could not imagine any connection between street vacation and the required give-away of private geothermal wells. That the conditions in *Parks* and *Nollan* could not even survive the most deferential standard of review does not establish that the Takings Clause never requires a closer look at conditions which may be more cleverly drafted.

As discussed above, this Court's comparison of the Taking Clause to the rational basis test of the Due Process Clause belies the notion the level of review is so minimal as to allow "assumed" impacts to suffice. Yet, the Oregon court's reliance on a "reasonably related" test in all practicality operates just like the rational basis test of the Due Process Clause. Government could assume many "impacts" from Mrs. Dolan's increased plumbing business. If she is required to contribute land for her employees and customers' recreational needs, what other needs must she satisfy? The need for education, police protection, food stamps?

The City of Tigard's ordinances indicate that all new development must contribute to the bicycle path and the greenway and the storm drainage system if the owner happens to own property in the path of these proposed improvements. The City code only applies to land which is in or adjacent to the floodplain. *See* Appendix K (Tigard

Community Development Code, section 18.120.180) and Appendix J (policies indicating the same). A bicycle shop does not need to dedicate land for the creation of bicycle paths if the shop's property is not located along the proposed pathway. Proposals which may equally increase the impervious surface area but do not include land in the floodplain are not subject to the conditions imposed on Mrs. Dolan, even though the impacts, if any, are identical.

This Court in *Nollan* warned about such abuses.

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Nollan, 483 U.S. at 835-36 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

The Oregon Supreme Court's ruling that the Takings Clause only requires a "reasonable relationship" between the conditions and assumable impacts of the use clearly conflicts with this Court's ruling that the Takings Clause requires more than a rational basis. The use of "assumed" impacts conflicts with *Nollan*'s disapproval of substituting cleverness and imagination for proof. Amicus urges the Court to grant the pending Petition for Writ of Certiorari.

II

THE OREGON SUPREME COURT HAS DECIDED FOR FIFTH AMENDMENT PURPOSES THAT THE NATURE OF JUDICIAL REVIEW OF CONDITIONS IMPOSED ON THE USE OF PROPERTY IS SEVERELY LIMITED IN CONFLICT WITH DECISIONS OF OTHER COURTS

The Oregon Supreme Court's decision in this case demonstrates another conflicting permutation on the way courts are expected to apply the Fifth Amendment to conditions imposed on the use of property. New York's highest court of last resort in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, *cert. denied*, 493 U.S. 976 (1989), was faced with applying *Nollan* to a requirement that owners of low income housing pay a $45,000 fee for every unit of housing they would remove from the rental market. Recognizing that the substantial advancement test of *Nollan* is an analysis of the **means** of acquiring the asserted interest, the New York Court concluded there must be a "close nexus" and "semi-strict or heightened judicial scrutiny." *Id.* at 111, 542 N.E.2d at 1068.

The Massachusetts Supreme Court came to a similar conclusion in *Steinbergh v. City of Cambridge*, 413 Mass. 736, 604 N.E.2d 1269 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2338 (1993), but with an unexplainable twist. The court held that the substantial advancement test "may express a higher standard at least in certain circumstances than the rational basis test commonly applicable in deciding whether an exercise of the police power satisfies due process or equal protection requirements." *Id.* at 745, 604 N.E.2d at 1276 (citing *Nollan*, 483 U.S. at 834 n.3).

Then, oddly enough, the Massachusetts court placed the burden of proving the test was not met on the private land owner. 413 Mass. at 745, 604 N.E.2d at 1276.

The California Court of Appeal in *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260, 277 Cal. Rptr. 371 (1991), also recognized that *Nollan* requires a closer look at the condition and the public burdens supposedly mitigated by the condition. A public access easement condition imposed on the construction of a revetment was invalid, even though revetments generally cause beach erosion, because no evidence showed that the particular revetment at issue caused erosion. *Id.* at 1268, 227 Cal. Rptr. at 376. The Oregon Supreme Court's approval of impacts which were hypothetical, assumable, and completely unquantified conflicts with these decisions.

This Court should grant the pending Petition for Writ of Certiorari to resolve the conflict between the Oregon Supreme Court and the courts of New York, Massachusetts and California. Since the use of the police power to pressure private parties to provide public benefits is in vogue today, the Court should ensure that the Constitutional rights of citizens not vary from jurisdiction to jurisdiction.

III

IN LIGHT OF THE WIDESPREAD CONFUSION AMONG COURTS ATTEMPTING TO APPLY *NOLLAN V. CALIFORNIA COASTAL COMMISSION*, THIS COURT SHOULD SETTLE THESE IMPORTANT QUESTIONS OF LAW

The differences between the New York, Massachusetts, California and Oregon cases are not the only evidence that these issues are unsettled. Many state and federal

courts which have attempted to apply this Court's ruling in *Nollan* to various types of conditions on the use of land have come to a wide array of approaches.

For instance, in *Sintra, Inc. v. City of Seattle*, 119 Wash. 2d 1, 829 P.2d 765, *cert. denied*, ___ U.S. ___, 113 S.Ct. 676 (1992), the Washington Supreme Court evaluated a housing preservation ordinance which required that those who seek to convert low income housing to other uses pay a fee to provide another, replacement source of low income housing. Surprisingly, the court ruled that "[t]his is not an exaction case, however, because no physical invasion has been effected by the [Housing Preservation Ordinance]. Thus contrary to Sintra's arguments, the *Nollan* nexus test does not apply." *Id.* at 16 n.7, 829 P.2d at 773 n.7.

The Washington Supreme Court also strangely applied the takings test which requires land use restrictions to "substantially advance a legitimate government interest" to the low income housing fee. "Here, the regulation must fairly be said to substantially advance a legitimate interest of the City in protecting its low income housing supply. If the regulation were valid, of course, the money could alleviate any housing shortage." *Id.* at 16-17, 829 P.2d at 774.

The *Sintra* court's discussion suggests that in the exaction context substantial advancement is nothing more than a check to see if what the government wants is legitimate and to see if the regulation actually delivers what the government wants – as if the **means** were unimportant. Apparently believing the substantial advancement test of the Takings Clause to be powerless against unfair means of achieving legitimate interests, the court

in *Sintra* went on to rule that this fee violated substantive due process instead. *Id.* at 24, 829 P.2d at 778.

Some divisions of the California Court of Appeal has come to similarly divergent conclusions. *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, 171, 4 Cal. Rptr. 2d 114, 118, *cert. denied*, ___ U.S. ___, 113 S.Ct. 191 (1992) ("we hold that any heightened scrutiny test contained in *Nollan* is limited to possessory rather than regulatory takings cases"); *City and County of San Francisco v. Goldon Gate Heights Investments*, 14 Cal. App. 4th 1203, 18 Cal. Rptr. 2d 347, *cert. denied*, ___ U.S. ___, 62 U.S.L.W. 3724 (1993); *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 2d 468 (1993)("Monetary exactions compelled as a condition of approval must be only rationally related to the government interest"). These rulings that *Nollan* does not apply to conditions which do not involve a physical invasion of property presume the California Coastal Commission would have been successful had it required the Nollans to pay a fee which the Commission used to purchase the easement, rather than require the easement directly.

The Ninth Circuit in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 873 (9th Cir. 1991) *cert. denied*, ___ U.S. ___, 112 S.Ct. 1997 (1992), looked only for a rational relationship between the condition and the development. More importantly, the court in *Commercial Builders* practically changed the review of permit conditions from *Nollan*'s substantial advancement test to a "no evidence" test.

> *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly

> responsible for the social ill in question. Rather, *Nollan* holds that **where there is no evidence of a nexus** between the development and the problem that the exaction seeks to address the exaction cannot be upheld.

Id. at 875 (emphasis added). *Nollan* must require something more than a complete lack of evidence or else the Court's contrast of the Takings Clause and the rational basis test of the Due Process Clause is meaningless. 483 U.S. at 834 n.3.

Because this Court in *Nollan* held that the California Coastal Commission could not even show a reasonable relationship and a such a relationship is all California law required, an appellate court in North Carolina thought the extent of judicial review for Fifth Amendment purposes hinged on **state** law. *Batch v. Town of Chapel Hill*, 92 N.C. App. 601, 376 S.E.2d 22, 31 (1989), *rev'd on other grounds*, 326 N.C. 1, 387 S.E.2d 655, *cert. denied*, 496 U.S. 931 (1990).

In another case, the Ninth Circuit understood that *Nollan* requires more than a stamp of approval on assumed public burdens to be addressed by the conditions on land use in *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 582 (9th Cir. 1991) ("relationship between the means and the ends must be closer for purposes of takings clause analysis"). However, the opinion was vacated on the grounds that the Takings Clause in the Fifth Amendment is not self-executing and, hence, the property owner could not assert a claim directly under the Constitution. *Azul Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1049 (1993).

Courts are in confusion. On one hand *Nollan* clearly commands that the Takings Clause requires a stricter level of scrutiny than the rational basis test of the Due Process Clause, coupled with an understanding that the substantial advancement test is more than a pleading requirement and requires the government to prove its condition meets the test. On the other hand, the Court assumed for the sake of argument that the Coastal Commission needed only to show a reasonable relationship between the condition and the public burdens because the Commission could not even make that showing.

This state of confusion has serious affects for those who own or hope to own real property. While the real estate market like all investments has some degree of risk for the individual, allowing government to impose conditions to alleviate public burdens which are assumed, imagined and completely unmeasured exacerbates the uncertainty in the value of real estate. If nothing more need be shown than what is in the City of Tigard's "findings," property use will be subject to the unquenchable desire for public improvements at no cost to the public. The value of property subject to practically unlimited demands for contributions to the public is anyone's guess. Limiting exactions based on real public burdens, however, adds certainty to one's property values.

The resolution of this case will settle these important issues. Can government condition property usage on hypothetical, assumable, and completely unquantified public burdens? If the Oregon Supreme Court decision is allowed to stand, *Nollan* will be practically meaningless since, when cleverness and imagination run rampant, just

about any government desire can be assumed to be related to a private property owner's proposal.

CONCLUSION

As government increasingly looks for new ways to provide public benefits, the insistence that those who seek a government permit satisfy the government's plans in order to obtain the permit is becoming increasingly common. As explained by Justice Beezer in his dissent in *Commercial Builders*, "legislators find it politically more palatable to exact payments from developers than to tax their constituents. The Takings Clause prohibits singling out developers to bear this burden." 941 F.2d at 876 (Beezer, J., dissenting).

If the Oregon Supreme Court decision in the present case remains, singling people out will become the order of the day, for it is far easier to place public burdens on relatively small groups of people than it is to proportion burdens evenly throughout society. Amicus curiae respectfully requests the Court to grant the Petition for Writ of Certiorari filed in this case and settle these significant issues.

Respectfully submitted,

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No. 93-518

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

On Petition for Writ Of Certiorari
To The Oregon Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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BEST AVAILABLE COPY

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the rules of this Court, *amici curiae* respectfully move for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief; however, the respondent has refused to provide consent.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with over 100,000 members and supporters nationwide, many of whom are small business owners and property owners who are subjected to a variety of exactions imposed by regulatory authorities at the local, state, and federal level as conditions on the reasonable use of their property. WLF devotes a substantial portion of its resources to litigating cases dealing with property rights in this and other courts. *See, e.g., Lucas v. South Carolina Coastal Comm'n*, 112 S. Ct. 2887 (1992). More pertinently, WLF appeared as an *amicus* in the instant case before the

Oregon Supreme Court, and can bring a broader perspective to the issues than the parties before this Court.

The Allied Educational Foundation (AEF) is a nonprofit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and economics, and has appeared before this Court as an *amicus* with WLF in *Lucas* and other cases.

Amici believe that their participation in this case will assist the Court in better understanding the issues in this case and the urgent need to have this Court clarify its ruling *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). *Nollan* has been seriously misinterpreted by the Oregon Supreme Court and other courts to the detriment of thousands of property owners nationwide.

It is also vitally important for the Court to clarify this issue because in these times of dwindling public fiscs, governmental authorities have increasingly resorted to imposing developmental exactions as a way of acquiring property and services at no cost to it. The case at bar and many others represent precisely the sort of blanket exaction which has been characterized as an "out-and-out plan of extortion." *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

Accordingly, *amici* respectfully request that they be granted leave to file the annexed brief.

Respectfully submitted,

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Commercial Home Builder's v. Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S Ct 1997 (1992) 11, 12
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Frank Ansuisi, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970) 6

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Hollywood, Inc. v. Broward County, 431 So.2d 606 (Fla. 4th DCA), *rev. denied*, 440 So.2d 352 (Fla. 1983) 9
Homebuilders Assoc. of Greater Kansas City v. City of Kansas, 555 S.W.2d 832 (Mo. 1977) . . 10
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Lampton v. Pinaire, 610 S.W.2d 915 (Ky. App. 1980) 10
Longridge Builders, Inc. v. Planning Board of Princeton Township, 52 N.J..348, 245 A.2d 336 (1968) 7, 8
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American Law Institute, *Model Land Development Code* (1976) 9

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No. 93-518

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

On Petition For Writ Of Certiorari
To The Oregon Supreme Court

BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

INTRODUCTION AND STATEMENT OF THE CASE

In the interests of judicial economy, *amici* Washington Legal Foundation, *et al.*, adopts by reference the statement of the case as presented in the Petition for Certiorari filed by petitioner Florence Dolan. Nevertheless, *amici* will briefly present those aspects of the case that are pertinent to the arguments presented in this brief.

The Petitioner, Florence Dolan, owns a 1.67 acre commercial lot on Main Street in the City of Tigard, Oregon. The lot is currently occupied by a 9700 square foot building used for the operation of a retail electric and plumbing supply store. The lot is contiguous to Fanno Creek, a small stream that runs adjacent to the lot. Petitioner's late husband, John T. Dolan, proposed to

expand their business by tearing down the existing building and by erecting a new 17,600 square feet building more suited to their needs and the needs of their customers. Together with her late husband, Petitioner applied to the city for the appropriate permits. The city was disposed to grant the permits but exacted as a condition for their approval that the Dolans dedicate to the city: (1) all of the portions of their lot lying within the 100 year floodplain, for use by the city as a greenway; and, (2) an additional 15 foot strip of property adjacent to and above the 100 year floodplain, for use for future reconstruction of a storm drainage channel and as a public pedestrian/bicycle pathway.

The Dolans initially appealed the permit conditions to the Oregon Land Use Board of Appeals (LUBA) alleging a violation of the Fifth and Fourteenth Amendments to the United States Constitution. LUBA dismissed this appeal, however, because, in its view, the Dolans' federal constitutional claim was not yet ripe. LUBA was of the opinion that this Court's precedents required the Dolans to pursue a variance before seeking judicial relief. The Dolans dutifully applied to the city for a variance which was denied by the city. The Dolans then initiated this appeal which was successively rejected by LUBA, the Oregon Court of Appeals and now by the Oregon Supreme Court, sitting *en banc*. Mrs. Dolan now appeals to this Court.

In 1973, the State of Oregon enacted a law requiring local governments to adopt comprehensive land use plans in compliance with statewide land use goals. One of the state land use goals, Goal 5, requires local governments to provide programs to protect, *inter alia* "[l]and needed or desirable for open space." Pet. App. I-1. Another goal, Goal 12, requires local governments to adopt a plan providing for a safe, convenient and economic transportation system which would "consider all modes of transportation including... bicycle and pedestrian." Pet. App. I-2. State law does not prescribe any particular means of achieving these noble goals, however.

The city has adopted a comprehensive land use plan to comply with the requirements of state law. The plan, last revised in 1983, includes a finding that the city would develop policies to retain "a vegetative buffer along streams and drainageways, to reduce runoff and flood damage and provide erosion and siltation control." Pet. App. J-1. The city's plan for Fanno Creek proposes to implement this noble policy by requiring the "dedication of all undeveloped land within the 100-year floodplain plus sufficient open land for greenway purposes specifically identified for recreation within the plan." Pet. App. J-1, 2. The dedication requirement applies to all proposals for development along Fanno Creek irrespective of the extent to which the proposals contribute to the need for the land dedicated or the portion of the tract that is located within the 100-year floodplain.

The question presented concerns principally the proper interpretation of this Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), which all parties concede controls the case at bar. To justify its exaction in this case, the city has made a series of findings which it believes establishes that the dedication requirements are "reasonably related to the applicant's request to intensify the development of this site."[1] The "findings" fairly establish that Petitioner's proposed intensified use of the site may contribute in at least some degree to the need for a pedestrian/bicycle pathway and for public stormwater management in the Fanno Creek watershed. But the "findings" do not attempt further to qualify or quantify this contribution.

In its decision, the majority of the Oregon Supreme Court rejected Petitioner's contention that *Nollan v. California Coastal Comm'n*, *supra*, established a

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[1] The city's "findings" are quoted extensively by the majority and dissenting opinion's of the Oregon Supreme Court. *See* Pet. App. A-5, A-8; A-19, A-23.

heightened standard of judicial scrutiny for exactions. In the majority's view, *Nollan* "tells us that an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve." Pet. App. A-15. Because the city's findings establish that Petitioner's intensified use of her land will contribute in at least some degree to the needs served by the its dedication requirements, the Oregon Supreme Court concluded that the city had satisfied its burden under *Nollan* to establish an "essential nexus" between the exaction and Petitioner's use of her land.

Justice Peterson dissented from the majority view. *See* dissenting opinion of Justice Peterson, A-17 *et seq*. In his dissenting opinion, Justice Peterson decried the facile and conclusory nature of the city's findings, which, while clearly demonstrating, in his view, the city's resolve to get the easements, failed to establish anything more than a speculative connection between the Petitioner's proposed use of her land and the need for the exactions. Citing the passage from *Nollan* which states that this Court views "the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination," 483 U.S. at 841, Justice Peterson concluded that the *Nollan* decision required more than the "theoretical nexus" established by the city's findings in the case at bar. Pet. App. A-19.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT AMONG STATE AND FEDERAL COURTS AS TO WHETHER *NOLLAN* REQUIRES THE APPLICATION OF A HEIGHTENED LEVEL OF SCRUTINY FOR DEVELOPMENTAL EXACTIONS

A. Most Courts Have Required The Application Of Some Standard Of Proportionality To Justify Developmental Exactions

While judicial scrutiny of subdivision control exactions dates back to the late nineteenth century,[2] most modern treatments of the subject begin with *Ayres v. City Council of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1 (1949).[3] In *Ayres*, the California Supreme Court upheld a municipal street exaction because it found the need for the street to be "***reasonably related*** to increased traffic and other needs of the proposed subdivision." *Id.*, 34 Cal.2d at 42. (Emphasis added.) *Ayres* has given rise to widely diverging interpretations, however. In *Parks v. Watson*, 716 F.2d 646, 651 (9th Cir. 1983), the Ninth Circuit Court of Appeals presented *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, 94 Cal Rptr 630, 4 Cal App 3d 633, 484 P.2d 606 (1971) and *Pioneer Trust and Sav. Bank v. Village of Mount Prospect*, 22 Ill 2d 375, 176 NE 2d 799 (1961) as paradigmatic of the two poles in the modern debate over developmental exactions. Ironically, both of these decisions present themselves as relying on *Ayres*.

While the schema presented by *Parks* is probably an oversimplification, it will nevertheless serve as an adequate basis for framing the issue in this case. At the one extreme stands the approach taken by the California courts prior to *Nollan*, which has now been adopted by the Oregon Supreme Court. As originally enunciated in *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, *supra*, and later refined in *Grupe v. California Coastal Comm'n*, 212 Cal Rptr 578, 166 Cal App 3d 148 (1985), the California courts held that a developmental exaction need not be directly related to the needs created by a developer's activity to be sustained. It is enough that the developer, either by himself, or in conjunction with others, contributes generally to the needs

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[2] *See* Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 Cornell L.Q. 871, 876-886 (1967).

[3] Hagmen, *Urban Planning and Land Development Control Law*, at 254 (1975) refers to *Ayres* as the "leading case on subdivision exactions."

toward which the exaction is directed, even if his development itself derives no benefit from the exaction. In *Grupe*, the plaintiff's beach-front home was "one more brick in the wall separating the People of California from the state's tidelands." 212 Cal Rptr at 589 & n.11. As far as the California courts were concerned, that settled the matter.

At the other end of the judicial spectrum stands the approach taken by the Illinois Supreme Court in *Pioneer Trust and Sav. Bank v. Village of Mount Prospect*, *supra*. According to the Illinois Supreme Court, a developmental exaction is valid only if the burden cast on the developer is "specifically and uniquely attributable to his activity." 176 NE2d at 802. Thus, the need alleviated by the exaction must be created solely by the developer's activity and the benefit derived from the exaction must accrue solely to the assessed property. The Illinois Supreme Court has been followed by a number of leading cases. *See Billings Properties Inc. v. Yellowstone County*, 144 Mont 25, 394 P2d 182 (1964); and *Frank Ansuisi, Inc. v. City of Cranston*, 107 RI 63, 264 A 2d 910 (1970).

The California rule places a heavy burden upon the developer to show that a particular exaction has *no* relationship whatsoever to a proposed development project. While it is more flexible than the old Illinois rule, it is also allows local governments "almost unlimited discretion in the imposition of dedication requirements." *Wald Corp. v. Metropolitan Dade County*, 338 So2d 863, at 866 (Fla.D.C.A. 1976). The old Illinois rule, on the other hand, does substantially reduce the potential for taking by subterfuge, but places a heavy burden on municipalities to show a *specific* connection between a particular subdivision and a specific street or park or school. This task is particularly difficult with regard to small residential subdivisions which contribute to the need for parks or roads or schools, but which lack sufficient land to dedicate for those purposes. The rigidity of the old Illinois rule

explains why most courts have sought to find a middle ground between the two extremes.[4]

Within the middle of the spectrum of judicial thought, at least two in-their-origins distinct schools may be identified. The first is the approach taken by the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*, 28 Wis 2d 608, 137 NW2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966), and its progeny.[5] *Jordan* concerned the validity of an impact fee for parks and schools. The Wisconsin Supreme Court recognized that it was unrealistic to expect a municipality to show that a proposed exaction was *exclusively* attributable to a specific subdivision. While it retained the term "specifically and uniquely attributable" as the proper yardstick for measuring the validity of exactions, it nevertheless noted that this standard was not to be applied too strictly so as to cast an unreasonable burden on municipalities.

The second school of thought occupying the broad middle ground is that taken by the New Jersey courts as exemplified by *Longridge Builders, Inc. v. Planning Board of Princeton Township*, 52 NJ 348, 245 A2d 336 (1968); and *181 Incorporated v. Salem County Planning Board*, 133 NJ Super 350, 336 A2d 501 (1975). In the typical New Jersey case, a road or some similar public improvement is projected on an official map or plan. As fate would have it, the projected infrastructure intersects a particular parcel of land proposed for development, or at least it is close enough that the development can be said in

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[4] The Illinois courts have themselves recently abandoned their old rule in favor of a more flexible approach. *Plote, Inc. v. Minnesota Alden Co.*, 52 Ill 550, 96 Ill App 3d 1260, 422 NE2d 231 (1981).

[5] *See Aunt Hack Ridge Estates, Inc. v. Planning Commission*, 160 Conn 109, 273 A2d 880 (1970); *Collis v. City of Bloomington*, 310 Minn 5, 246 NW2d 19 (1976); *Briar West, Inc. v. Lincoln*, 206 Neb 172, 291 NW2d 730 (1980); and *Call v. West Jordan*, 614 P2d 1257 (Utah 1980).

some sense to require it. The question, of course, is under what circumstances can the developer be forced to pay for the needed infrastructure? The answer of the New Jersey courts has been twofold: First, there must be a "substantial, demonstrably clear and [temporally] present" connection to the development project and the prospective infrastructure. *181 Incorporated*, *supra*, 336 A.2d at 506.[6] Second, the costs of the proposed improvement must be properly apportioned between the developer and the public. "[A subdivider may] be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision." *Longridge Builders, Inc. v. Planning Board of Princeton Township*, 245 A2d at 337. Generally speaking it may be said that the rules for the allocation of the costs are derived from the law of special assessments. *See Divan Builders, Inc. v. Planning Bd. of Tp. of Wayne*, 66 NJ 582, 334 A2d 30 (1975).

The use of the term "rational nexus" within the context of developmental exactions would seem to have been popularized by Johnston's, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, *supra*. The term does not occur in *Jordan* or the earliest cases following *Jordan*. Nor does it occur in any of the New Jersey cases prior to *Longridge*. In the first few decisions that do employ the term, it usually occurs in a quote or at least while citing Johnston.[7] Nonetheless, since *Wald Corp. v. Metropolitan Dade County*, *supra*, it has become customary to refer to both the *Jordan* and New

[6] This is sometimes called a "cause and effect" relationship. *Pennell v. San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting).

[7] *See Collis v. City of Bloomington*, 246 NW2d at 24; and *Longridge*, 245 A2d at 237.

Jersey schools in rather syncretistic fashion as the "rational nexus test" without further qualification.[8]

While the *Jordan* and New Jersey schools differ with regard to their historical origins, they are united by two factors which also serve to distinguish them from the approach taken by the California courts prior to *Nollan*: First, they place a substantial though not unreasonable burden on the municipal government to justify its exactions. *See Collis v. City of Bloomington*, 310 Minn 5, 246 NW2d at 25 (1976) ("Standards can be developed and supported only after considerable data have been gathered and carefully analyzed"). Second, they require a proper allocation of the public and private costs of proposed improvements, except in those circumstances where a particular development project, or group of projects, is the sole beneficiary of the projected improvements.[9]

There are also numerous cases which do not fit easily into any particular school of thought. In *Gulest Ass'n v. Town of Newburgh*, 25 Misc2d 1004, 209 NYS2d 729 (Super. Ct. 1960), *aff'd*, 15 AD2d 815, 225 NYS 538 (App. Div. 1962), for example, a New York Court employed a "direct benefit" test, a term evidently borrowed from the law of special assessments. In *Swing v. Baton Rouge*, 249 So2d 304 (La.App.), application denied, 259 La 770, 252 So2d 667 (1971), a Louisiana court declared a street exaction invalid because the proposed extension of the street served the "primary benefit" of the public at large. In *Home Builders*

[8] *See Wald*, *supra*, 338 So2d at 867-868; and *Howard County v. JJM, Inc.*, 301 Md 256, 280-81, 482 A2d 908 (1984).

[9] With regard to impact fees, definite rules have been developed to prevent the commingling of funds and to ensure that funds are in fact expended within a reasonable period of time for the purposes for which they were ostensibly raised. *See Hollywood, Inc. v. Broward County*, 431 So2d 606, 612 (Fla. 4th DCA), *rev. denied*, 440 So2d 352 (Fla. 1983). *See also*, *Banberry v. South Jordan City*, 631 P.2d 899, 903-904 (Utah 1981).

Association of Greater Kansas City v. City of Kansas, 555 SW2d 832, 835 (Mo. 1977), the Missouri Supreme Court held that a park dedication requirement or impact fee could be sustained so long as the burden cast on the developer was "reasonably attributable" to the developer's activity. In *Lampton v. Pinaire*, 610 SW2d 915 (Ky. App. 1980), a Kentucky court declared a street exaction reasonable so long as it was based on the "reasonably anticipated burdens" to be caused by the development. In *City of College Station v. Turtle Rock Corp.*, 680 SW2d 802 (Tex 1984), a Texas court adopted a "reasonable connection" standard to assess the validity of a park exaction, citing the American Law Institute's *Model Land Development Code* § 2-103 at 38 (1976).

While a few of the cases which we have cited above place the burden on the developer challenging and exaction to show that the necessary connection to the needs created by the developer's own activity is not present, *see eg.*, *City of College Station v. Turtle Rock Corp.*, *supra*; and *Call v. West Jordan*, *supra*, virtually all of the cases outside of California, and now Oregon, require some fair standard of apportionment of costs in accordance with the public and private contribution to the need for a public improvement. In most instances, these cases draw either explicitly or implicitly on the language of special assessments. *See*, *eg.*, *Bethlehem Evangelical Lutheran Church v. Lakewood*, 626 P2d 668, 672 (Colo. 1981) ("The theory upon which the owner of the property abutting a street may be required to pay the costs of public improvements... is that the property is ***especially*** benefited by the improvements over and above the general benefit to the public at large"). (Emphasis in original.)[10]

[10] The Oregon Supreme Court has itself acknowledged that a special assessment cannot be upheld without "some system of *just apportionment*." *MacVeagh v. Multnomah County*, 126 Or 417, 270 P 502 (1928)(emphasis added).

B. *Nollan* Requires Some Standard Of Proportionality To Justify Imposing Developmental Exactions Without Just Compensation

Initially, most courts and commentators interpreted the decision of this Court in *Nollan* as requiring a higher standard of judicial scrutiny for exactions than that heretofore required by the California courts. *See* Petition for Certiorari, at 23-25. In *Commercial Home Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), a panel from the Ninth Circuit doubted whether *Nollan* had done anything to change the standard of scrutiny applicable to exactions. Subsequent to this Court's summary affirmance of *Commercial Home Builders*, *see* 112 S. Ct. 1997 (1992), a small number of jurisdictions appear to be vying with each other to see how far they can go before this Court will intervene.[11] The case at bar goes pretty far. At oral argument before the Oregon Court of Appeals, the city conceded that the Dolans would be required to dedicate the same amount of land even if they were proposing to erect a "15 cubic foot fruit stand" instead of a 17,600 square foot building. *Cf.* Petition For Writ of Certiorari, at 11-12, citing Audio R. Tape, *Dolan v. City of Tigard*, 113 Or App, 832 P2d 853 (1992), argued 4-13-92, Cue No. 40.[12] While part II of the *Nollan* decision was

[11] Aside from the case at bar, two other recent cases are particularly troubling. *Cf. Pengilly v. Multnomah County*, 810 F. Supp 1111 (D.Or. 1992) (sustaining a blanket exaction requiring all persons who happen to improve land adjacent to a public road to dedicate additional right-of-way); *and Ehrlich v. City of Culver City*, 15 Cal App 4th 1737 (2nd Dist. CA 1993), petition for review denied, (No. S033642, Aug. 1993)(sustaining impact fee based on loss of "recreational opportunities" ostensibly created developer's discontinued operation of an unprofitable recreational facility).

[12] Thus, the case at bar represents precisely the sort of blanket exaction which the New Hampshire Supreme Court characterized as an "out-and-out plan of extorsion" in *J.E.D. Associates, Inc. v. Atkinson*, 121 NH 581, 584, 432 A2d 12, 14-15 (1981). See also *Nollan v. California Coastal Comm'n*, 483 U.S. at 837.

couched in the terms peculiar to the argument in that case, it is clear that the underlying question was one of proportionality. The dissent clearly recognized that *Nollan* was requiring a closer relationship between the burden created by a proposed development and the condition imposed under the state's police power to mitigate that burden, than the California courts had hitherto required. *Cf. Nollan*, 107 S Ct at 3151 (Brennan, J., dissenting) ("The Court finds this an illegitimate exercise of the police power, because it maintains that there is **no reasonable relationship between the effect** of the development **and the condition imposed**"); and *Id.*, 107 S Ct at 3163 (Blackmun, J., dissenting) ("I disagree with the Court's rigid interpretation of the **necessary correlation between a burden** created by development **and a condition** imposed pursuant to the State's police power **to mitigate that burden**") (emphasis added). Thus, in part III of the *Nollan* opinion, the Court relied on numerous state court decisions applying different proportionality standards. *See Nollan*, 107 S Ct at 3150 (citing cases). While the *Nollan* Court disclaimed the need to decide **which** standard of proportionality should be applied to exactions, 107 S Ct at 3149, it arguably did require the application of at least **some** standard.

This Court's summary affirmance of *Commercial Home Builders v. Sacramento*, *supra*, is not to the contrary. Despite its verbal formulations to the contrary, the Ninth Circuit arrived at its decision in that case only after the city presented:

> a *careful study* reveal[ing] the *amount* of low-income housing that would likely become necessary as a direct result of the influx of workers that would be associated with the new nonresidential development. It assesses only a *small portion* of a *conservative estimate* of the cost of such additional housing.

941 F.2d at 874 (emphasis added). In other words, the exaction in that case *did* satisfy a heightened level of scrutiny.

The case at bar illustrates why heightened scrutiny should be required of exactions. The City of Tigard has found that it is "reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreation needs." Pet. App. at A-5, 6, quoting City of Tigard Planning Commission Final Order No. 91-09 PC at 13, 20-21. And the majority of the Oregon Supreme Court believes that this "finding" should be sufficient to sustain the exaction in the case at bar. And yet, virtually the same finding could have been made if the city were proposing to construct a six-lane interstate freeway through Mrs. Dolans lot. Surely, if the city were to build such a freeway, it would be "reasonable to assume" that Mrs. Dolan's customers would use it. Virtually ***every*** public improvement can be said to benefit ***in some sense both*** the developer and the general public. Under the standard adopted by the Oregon Supreme Court in the case at bar, virtually every exaction would be upheld.

In his dissenting opinion, Justice Peterson draws our attention to the growth in population currently experience by the State of Oregon and it is perhaps as a reaction to the perceived onslaught of *hoi polloi* that we are to attribute the highly deferential approach to exactions adopted by the majority on the Oregon Supreme Court. The adoption of modern zoning laws were justified by this Court on a similar basis over half a century ago. *Cf. Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) ("[B]ut with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities").

Considered in its best light, the City of Tigard may be merely attempting to make those who intensify the use of their land to assume responsibility for the public consequences of their private actions. On the other hand, we know that governments at all levels are experiencing

a shortage of funds due to the current restructuring in our national economy. Congress and state legislatures have an unfortunate propensity to impose mandates on local governments without providing the funds to implement them. And there is also strong public sentiment in virtually every corner of our nation against raising taxes. Local governments are all too often faced with tremendous pressures to shift the burden for needed public improvements onto some narrow segment of society. Developmental exactions are a particularly attractive alternative because their cost is paid for primarily by future residents who cannot as yet vote. They are also among the principle exclusionary devices commonly used by existing communities use to keep certain people out (particularly those who make less money than the current residents do).[13] We do not know on present reading whether the City of Tigard is attempting to make Mrs. Dolan to pay her fair share, or whether it is attempting to accomplish some illicit purpose under the guise of the police powers. We do know that other communities have survived more intense growth pressures than the State of Oregon currently does without suspending constitutional

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[13] *See "Not In My Back Yard" Removing Barriers to Affordable Housing*, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing (Washington 1991); *Final Report of the Governor's Task Force on--*Spectrum--*Housing For Economic Growth* at 28-29 (Maryland, December 1, 1990) ("Subdivision regulations can increase the direct cost of land by requiring land improvements and exactions -- particularly considering the increased tendency of local and county governments to negotiate substantial developer contributions and exactions as a condition for plat approval... In some cases subdivision regulations require improvements that exceed the demands of the prospective residents raising serious questions about the legality of these requirements on developers and the subsequent additional costs to a unit of housing"). The crisis in affordable housing is a problem that has been recognized on the national level.

guarantees.[14] We also know that there are sound reasons of public policy for applying a heightened standard of judicial scrutiny to developmental exactions. As Justice Peterson suggested, "If in the fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely why the need in fact exists is a modest burden to place on the government." Pet. App. at 29.

CONCLUSION

For the foregoing reasons and those specified in the petition for writ of certiorari, amici curiae urge this Court to grant the writ.

Respectfully submitted,

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Date: November 4, 1993

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[14] Between July 23, 1959, and March 15, 1963, for example, the Village of Menomonee Falls, Wisconsin, approved 41 plats containing 638 lots. The village's population increased from 6,262 in 1950 to 18,276 in 1960, and to a then estimated population of 25,000 in 1964. *Jordan v. Village of Menomonee Falls*, 137 NW2d at 444. The Wisconsin Supreme Court ***sustained*** the park and school exaction there called into question under what we would now call the "rational nexus" test. Clearly, legitimate exactions have nothing to fear from meaningful judicial scrutiny. *Cf.* White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives* in Young, *1992 Zoning and Planning Law Handbook*, 301, 310 (1992) (noting that the "rational nexus" test is fast becoming the majority rule in the United States).

a shortage of funds due to the current restructuring in our national economy. Congress and state legislatures have an unfortunate propensity to impose mandates on local governments without providing the funds to implement them. And there is also strong public sentiment in virtually every corner of our nation against raising taxes. Local governments are all too often faced with tremendous pressures to shift the burden for needed public improvements onto some narrow segment of society. Developmental exactions are a particularly attractive alternative because their cost is paid for primarily by future residents who cannot as yet vote. They are also among the principle exclusionary devices commonly used by existing communities use to keep certain people out (particularly those who make less money than the current residents do).[13] We do not know on present reading whether the City of Tigard is attempting to make Mrs. Dolan to pay her fair share, or whether it is attempting to accomplish some illicit purpose under the guise of the police powers. We do know that other communities have survived more intense growth pressures than the State of Oregon currently does without suspending constitutional

[13] *See "Not In My Back Yard" Removing Barriers to Affordable Housing*, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing (Washington 1991); *Final Report of the Governor's Task Force on--*Spectrum--*Housing For Economic Growth* at 28-29 (Maryland, December 1, 1990) ("Subdivision regulations can increase the direct cost of land by requiring land improvements and exactions -- particularly considering the increased tendency of local and county governments to negotiate substantial developer contributions and exactions as a condition for plat approval... In some cases subdivision regulations require improvements that exceed the demands of the prospective residents raising serious questions about the legality of these requirements on developers and the subsequent additional costs to a unit of housing"). The crisis in affordable housing is a problem that has been recognized on the national level.

guarantees.[14] We also know that there are sound reasons of public policy for applying a heightened standard of judicial scrutiny to developmental exactions. As Justice Peterson suggested, "If in the fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely why the need in fact exists is a modest burden to place on the government." Pet. App. at 29.

CONCLUSION

For the foregoing reasons and those specified in the petition for writ of certiorari, amici curiae urge this Court to grant the writ.

Respectfully submitted,

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Date: November 4, 1993

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No. 93-518

In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State of Oregon

BRIEF OF GEORGIA PUBLIC POLICY FOUNDATION AND SOUTHEASTERN LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF
GEORGIA PUBLIC POLICY FOUNDATION
AND
SOUTHEASTERN LEGAL FOUNDATION
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICI

The Georgia Public Policy Foundation and Southeastern Legal Foundation submit their brief as *amici curiae* in this case. The parties have consented to the filing of this brief, and their consent letters have been filed with the Clerk of this Court.

The Georgia Public Policy Foundation is a non-partisan, non-profit research and education foundation. Its members include more than 1500 citizens of Georgia, including numerous current or former U.S. and state

legislators, local elected officials, and the executive officers of more than one hundred small businesses, corporations, and trade associations operating within Georgia.

The Georgia Public Policy Foundation conducts research to develop practical proposals on public policy questions of significant concern to the people of Georgia. Its members believe that the well-being and future hopes of our nation are best advanced by public policies that spur economic growth, enhance individual opportunity, empower citizens, and defend traditional economic principles. In recognition of this, the organization includes in its areas of concern the government's treatment of private property.

Southeastern Legal Foundation ("Southeastern") is a public interest law firm which provides the courts with the views of those who support limited government, individual economic freedom and the free enterprise system. Southeastern's function is to engage in litigation in support of these principles, and to oppose governmental abuse of authority at all levels. In the course of carrying out this mission, Southeastern provides direct legal representation to parties in civil litigation, and files *amicus curiae* briefs in selected cases, where important public policy issues are presented. Southeastern appeared as counsel of record in this Court for the petitioner in *Northeastern Florida Contractors v. Jacksonville*, 113 S.Ct. 2297 (1993), and has appeared as *amicus curiae* in numerous cases, most recently in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886 (1992).

As an advocate for individual economic freedom and private property rights, Southeastern presents the views

of its supporters who believe that such individual rights should be protected against governmental intrusion. Southeastern believes that the Oregon Supreme Court's decision in this case constitutes a failure to protect private property rights and a departure from this Court's precedents. Southeastern believes this case is an opportunity for this Court to reaffirm its strong support for private property rights.

STATEMENT OF THE CASE

Amici Georgia Policy Foundation and Southeastern Legal Foundation adopt the statement of the case contained in the brief of the Petitioner.

SUMMARY OF ARGUMENT

In order to effectively protect private property rights from arbitrary and intrusive governmental regulations, this Court should reaffirm the standard articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987). Since the *Nollan* ruling, courts have been split as to its implications. Some courts have either ignored *Nollan* or reduced its application to physical takings, thus holding *Nollan* inapplicable to cases involving regulatory takings. The fact that some courts have declined to follow *Nollan*, or limited its application to only possessory takings cases, attests to the need for this Court to promulgate a clear and concise interpretation of the *Nollan* standard for courts to apply to all takings cases.

The Oregon Supreme Court applied the wrong standard of judicial scrutiny in this case. In rejecting the heightened scrutiny analysis this Court promulgated in *Nollan*, the Oregon Supreme Court essentially applied the "rational basis" test that was specifically rejected in *Nollan*. Believing the city merely needed to demonstrate a reasonable relationship between the impacts of the development and the dedication requirements, the Oregon Supreme Court accepted the city's unsubstantiated findings as supporting the dedication conditions imposed by the city. The dissent would apply the heightened scrutiny standard adopted in *Nollan* by requiring the respondent to produce more than general policy statements and unsubstantiated findings in order to justify the imposition of an exaction.

The standard utilized by the Oregon Supreme Court is essentially a rational basis test. If the decision of the Oregon Supreme Court is affirmed, the takings analysis will be reduced to nothing more than a pleading requirement. In spite of Justice Scalia's opinion in *Nollan*, that "our opinions do not establish that these standards are the same as those applied to due process or equal protection claims," the Oregon court applied the rational basis test. A rational basis test is inadequate to protect property rights from the increasing tendency of state and local governments to extort public improvements from property owners as a prerequisite to granting development permits. Only by requiring a strong factual showing that the specific effects of the development will be mitigated by the condition imposed, will property rights be secure.

Finally, the protection of property rights was at the core of the purposes for which our government was

formed, and property rights should be given the same protection as all other civil rights.

ARGUMENT

I.

THE STANDARD TO BE APPLIED IN TAKINGS CASES, REQUIRING AN EXACTION TO SUBSTANTIALLY ADVANCE A LEGITIMATE STATE INTEREST, NEEDS TO BE CLEARLY DEFINED AND UNAMBIGUOUSLY EMBRACED BY THIS COURT.

In order to effectively protect private property rights from arbitrary and intrusive governmental regulations, this Court should reaffirm the standard articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987). The Nollans desired to demolish the existing bungalow on their beachfront lot and replace it with a larger home. The California Coastal Commission would only award a coastal development permit subject to the condition that the Nollans allow the public an easement across their property. The California Court of Appeal upheld the imposition of the easement condition by applying the reasoning of an earlier case. *Grupe v. California Coastal Commission*, 166 Cal.App.3d 148, 212 Cal.Rptr. 578 (1985) (finding that even if there was only an indirect relationship between the access exacted and the need to which the project contributed, the imposition of the access condition on the development permit was sufficiently related to burdens created by the project).

The U.S. Supreme Court found that the Coastal Commission's exaction of a public easement as a condition to

the granting of a coastal development permit amounted to "out and out extortion," and was a taking without compensation in violation of the Fifth Amendment. *Id.* at 837, 839. The court invalidated the condition, finding that the exaction failed to substantially advance a legitimate state interest. *Id.* at 841, 842. This Court held that the Coastal Commission's exaction of a public easement failed to establish an "essential nexus" between the exaction and the substantial advancement of a legitimate state interest. While it is apparent that the *Nollan* court was contemplating a heightened scrutiny standard in reviewing exactions, it remains unclear as to exactly what the court intended.[1]

Since the *Nollan* ruling, courts have been split as to its implications. Some courts have either ignored *Nollan* or reduced its application to cases involving physical takings, thus holding *Nollan* inapplicable to cases involving regulatory takings. See Delaney, *Exactions: From Early Subdivision Dedications to User Impact Fees and Linkage in the Post-Nollan Era*, C750 ALI-ABA 859 (1992). See also, *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 118 L. Ed. 2d 593 (1992) (The Ninth Circuit used a "rational relationship" test to justify conditioning certain non-residential building permits on the payment of a fee into a low-income housing trust fund); *Blue Jeans Equities*

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[1] The *Nollan* court acknowledges that its standard is somewhat vague in saying: "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Nollan* at 834.

West v. City and County of San Francisco, 4 Cal.Rptr.2d 114 (Cal.Ct. App. 1992), *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 135 (1992) (Holding *Nollan*'s heightened scrutiny requirement applicable only to possessory rather than regulatory takings).

Other courts, meanwhile, have recognized *Nollan* as establishing a heightened level of scrutiny in *all* takings cases. See *Seawell Associates v. City of New York*, 542 N.E.2d 1059, *cert. denied*, 493 U.S. 976 (1989) (holding regulatory takings require "semi-strict or heightened judicial scrutiny" of the nexus between the monetary exaction and the state interest); *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App.3d 1260 (1991) (specifically denouncing the rational basis test in favor of a heightened scrutiny standard of constitutional review in takings cases).

The fact that some courts have declined to follow *Nollan*, or limited its application to only possessory takings cases, attests to the need for this Court to promulgate a clear and concise interpretation of the *Nollan* standard for courts to apply to all takings cases. The present case exemplifies the need for clarification of the scope and meaning of the *Nollan* ruling, as the Oregon Supreme Court fails to recognize *Nollan* as requiring a heightened level of scrutiny for takings cases. Rather, the court relies on the Ninth Circuit's opinion in *Commercial Builders*, which cites *Parks v. Watson*, 716 F.2d 646 (CA9 1983) for the position that *Nollan* did not change the level of scrutiny. *Parks*, however, pre-dates *Nollan*, and any reliance on it is therefore misplaced. An opportunity now exists for this Court to reconcile court decisions, such as

that in this case and in *Commercial Builders*, with the standard established in *Nollan*.

II.

THE STANDARD APPLIED BY THE OREGON SUPREME COURT, REQUIRING THAT THE EXACTION REASONABLY RELATE TO A LEGITIMATE STATE INTEREST, HAS BEEN SPECIFICALLY REJECTED BY THIS COURT.

The Oregon Supreme Court applied the wrong standard of judicial review in this case. In rejecting the heightened scrutiny analysis this Court promulgated in *Nollan*, the Oregon Supreme Court essentially applied the "rational basis" test that was specifically rejected in *Nollan*. The Oregon Supreme Court justified its application of a "reasonably related" test by failing to recognize this Court's requirement that heightened judicial scrutiny be used to examine the relationship between a proposed exaction and a legitimate governmental interest.

> In *Nollan*, the Court did not purport to abandon the generally recognized "reasonably related" test . . . thus, we are unable to agree with the petitioners that the *Nollan* court abandoned the "reasonably related" test. *Dolan v. City of Tigard*, 854 P.2d 437, 441 (1993)

In applying the reasonable relation test, the Oregon Supreme Court essentially applied the rational basis test proposed by Justice Brennan in his *Nollan* dissent. The *Nollan* majority explicitly rejected Justice Brennan's dissent, which advocated the upholding of an exaction where the state "could rationally have decided that the measure adopted might achieve the state's objective."

Nollan, at 3152 (Justice Brennan dissenting), quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981). In dismissing Justice Brennan's proposed "rational basis" analysis, Justice Scalia wrote:

> Contrary to Justice Brennan's claim, *post*, at 3150, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), . . . Justice Brennan relies principally on an equal protection case . . . and two substantive due process cases . . . in support of the standards he would adopt. But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical. *Nollan*, at 834, fn. 3.

It is clear that the standard advanced by Justice Scalia in *Nollan* is more rigorous than the rational basis analysis or the virtually synonymous reasonable relation standard utilized by the Oregon Supreme Court. Justice Scalia clearly repudiates Justice Brennan's dissenting opinion which equates the test to be applied in takings cases to the rational basis test applied to due process or equal protection claims.

In spite of this clear pronouncement by the *Nollan* majority that a heightened level of scrutiny controls, the

Oregon Supreme Court interpreted *Nollan* as holding "that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld." A-12, citing *Commercial Builders v. Sacramento*, 941 F.2d at 874-875. Since the Oregon Supreme Court was only looking for *any* evidence of a nexus, it erroneously relied upon the highly speculative and unsubstantiated evidence offered by the city to justify the conditions it placed upon the awarding of the development permit.

A. The evidence relied upon to justify the exaction requirement was insufficient to satisfy *Nollan's* heightened scrutiny requirements.

The issue in this case "is whether the city has demonstrated the required relationship between the conditions that it attached to its approval of petitioners' proposed land use and the expected impacts of that land use." *Dolan*, 854 P.2d at 438. Thus, for the development permit to meet the *Nollan* test, there must be an "essential nexus" between the permit condition and the impact of the proposed development.[2]

Believing the city merely needed to demonstrate a reasonable relationship between the impacts of the development and the dedication requirements, the Oregon

[2] In *Nollan*, the nexus at issue was between the identified harm and the condition imposed, not between the proposed use and the asserted public harm. See Groen, *Nollan v. California Coastal Commission: An Update*, C549 ALI-ABA 325 (1990)

Supreme Court accepted the city's unsubstantiated findings as supporting the dedication conditions imposed by the city. *Dolan*, 854 P.2d at 443. Neither the Oregon Supreme Court's opinion nor the speculative statements by the City of Tigard Planning Commission demonstrate how the proposed development will create the need for the exaction of the easements. The only evidence submitted by the respondent, which is thoroughly refuted by the dissent,[3] is remarkably similar to that relied upon by the California Court of Appeal in *Grupe v. California Coastal Commission*, 166 Cal.App.3d 148, 212 Cal.Rptr. 578 (1985).[4] The "indirect relationship" accepted by the *Grupe* court is not sufficient to meet the "substantial relationship" required by the *Nollan* court.

[3] The dissent of Peterson, J., believes the evidence relied upon by the majority is insufficient to satisfy federal precedent. The dissent demonstrates at length how the evidence relied upon by the majority "show[s] the resolve of the city to get the easements and . . . in no way establish that the easements necessarily are needed because of increased intensity of use of petitioners' (or anyone else's) property." Dissent, A-23.

[4] The *Nollan* court, in reversing the California Court of Appeal, cites *Grupe* as the case relied upon by the Court of Appeal in judging the easement exaction to not be a violation of the Takings Clause. "In that case [*Grupe*], the court had found that so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there *was only an indirect relationship between the access exacted and the need to which the project contributed*, imposition of an access condition on a development permit was *sufficiently related* to burdens created by the project to be constitutional." *Nollan*, at 830, citing *Grupe*, 177 Cal.App.3d, at 723 (emphasis added).

Utilizing the reasonable relationship test, the Oregon Supreme Court accepted the general and factually unsupported statements of the respondent as supporting the dedication requirements. The nature of the evidence presented by the city's order, as analyzed by the dissent, establishes only a tenuous relationship between the expansion of the petitioner's store and the exactions. The following excerpt from the "City of Tigard Planning Commission Final Order," which relates to the pedestrian/bicycle pathway easement, is devoid of any factual findings.

> We are persuaded that the transportation needs of petitioners' employees and customers and the increased traffic congestion that will result from the development of petitioners' land do have an essential nexus to the development site, and that this condition, therefore, is reasonably related to the impact of the expansion of their business. *Dolan*, 854 P.2d at 443.

This statement reflects the planning commission's reliance on supposition, similar to the "sufficiently related" standard used by *Grupe*, and subsequently rejected by *Nollan*.

The dissent of Peterson, J., of the Oregon Supreme Court, challenges the majority's acceptance of the planning commission's justification for demanding the exactments. In requiring a certain level of specificity to establish the essential nexus, the dissent would require the planning commission to conduct a study to prove a direct and proportionate link between the proposed development and its adverse public impacts.

> In establishing that the need for the exactions arises from an increased intensity of use, the government must show more than a theoretical nexus. It must show that the granting of the permit probably will create specific problems, burdens, or conditions that theretofore did not exist, and that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise from the granting of the permit. More than general statements of concern about increased traffic or public safety are required to support, as permissible regulation, what otherwise would be a taking. *Dolan*, 854 P.2d at 444 (Peterson, J., dissenting).

The dissent would apply the heightened scrutiny standard adopted in *Nollan* by requiring the respondent to produce more than general policy statements and unsubstantiated findings in order to justify the imposition of an exaction.

B. This Court should take this opportunity to establish a strong evidentiary standard to be used in reviewing the constitutionality of exactions.

The standard utilized by the Oregon Supreme Court is essentially a rational basis test. While Justice Brennan would apply the rational basis test to the nexus requirement, the *Nollan* court clearly repudiated a standard that would merely rubber stamp any rational reason put forth by the regulatory entity.

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement,

> and compliance with it to be more than an exercise in cleverness and imagination. *Nollan* at 841.

If the decision of the Oregon Supreme Court is affirmed, the takings analysis will be reduced to nothing more than a pleading requirement. As the dissenting opinion of the Oregon Supreme Court points out, "if all that need be shown is that easements are needed for a legitimate public purpose, the constitutional requirement evaporates. The critical question before us is whether the order shows an increased intensity of such magnitude that it creates the need for the exaction of the easements." A-23. The dissent correctly interprets *Nollan* to require that "findings [of fact] demonstrate that the increased intensity of use requires the exaction." *Dolan*, 854 P.2d at 447.

The Oregon Supreme Court standard of review is not a heightened standard but rather "a paradigm of judicial restraint." *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2101 (1993) (Fifth Amendment equal protection challenge to provision in Cable Communication Policy Act). An affirmation of the Oregon decision will essentially uphold any exaction requirement "if there is any reasonably conceivable state of facts that could be a rational basis for the . . . [exaction]." *Id.*; See e.g., *Heller v. Doe By Doe*, 113 S.Ct. 2637 (1993) (courts are compelled under rational basis to accept legislature's generalizations even when there is imperfect fit between means and ends). In spite of Justice Scalia's opinion in *Nollan*, that "our opinions do not establish that these [takings] standards are the same as those applied to due process or equal protection claims," the standard applied by the Oregon court is nothing more than the rational basis test. *Nollan*, 483 U.S. at 834, fn. 3.

While Justice Scalia balks at accepting an analogy between the equal protection or due process standards and the Fifth Amendment taking standard, he made it apparent that there must be a close and specific link between the development impacts and the conditions of approval. In dissent, Justice Brennan characterized the majority's opinion as an "unusual demand for a precise match between the condition imposed and the specific type of burden on access created by appellants." *Id.* at 849. Requiring a close fit between the exaction and the burden is analogous to the strict scrutiny standard under the Equal Protection Clause of the Fourteenth Amendment. The strict scrutiny test "ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate . . . " *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). In the case that labeled the most exacting judicial examination as "strict scrutiny," the court wrote:

> We have held that "in order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305-07 (plurality opinion) (citations omitted).

Notwithstanding that the standard of an equal protection claim is "quite different" from that of a taking analysis, Amici believe that an analogous standard could serve to adequately protect property rights.

Amici respectfully urge this Court to adopt a standard that requires a strong evidentiary showing of causation between the development and the public harm in order to justify the exaction. In equal protection cases involving a racial classification, this Court requires that the use of such classifications be "narrowly tailored" to accomplish the compelling government interest. *City of Richmond v. J.A. Croson*. Furthermore, the classifications must "have a strong basis in evidence" to show their necessity. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986). By expounding a test that requires the exaction to specifically remedy the public harm directly caused by the development, this Court would be protecting property rights as stringently as it protects other civil rights.

III.

PROPERTY RIGHTS NEED TO BE PROTECTED AS STRINGENTLY AS OTHER CIVIL RIGHTS.

A rational basis test is inadequate to protect property rights from the increasing tendency of state and local governments to extort public improvements from property owners as a prerequisite to granting development permits. The dissent below believed this to be the case, stating:

> state and local governments attempt to further particular goals by placing limitations on uses of private property that will only be lifted if the property owners 'dedicate' some portion of their property to the particular government program. The temptation, particularly in times of limited tax revenues, is to place the primary

> burden for funding projects on the shoulders of those whose property happens to be in the neighborhood of the proposed projects, whether or not the projects bear any relationship to the property or to the uses to which the property is put. *Dolan*, 854 P.2d at 447.

Analogous to the growth in unfunded federal mandates being imposed upon state and local governments, there is a growing trend in state and local governments to make unfunded public improvements at the expense of individual property owners. Only by requiring a strong factual showing that the specific effects of the development will be mitigated by the condition imposed, will property rights be secure.

The danger in this case stems from the Oregon court's uncritical deference to the city's good intentions. There is no reason to believe that the city was motivated by anything other than a desire to help the public, but good intentions are not an adequate protection against abuse of power. As Justice Holmes once noted, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

It is never difficult for a government to find noble motives for its actions. Most infringements on personal liberty are prompted by quite reasonable, even laudable, impulses. *See, e.g., United States v. 92 Buena Vista Ave.*, 113 S.Ct. 1126 (1993) (drug enforcement through civil forfeiture cannot override rights of third-party owners who obtain a property interest without any knowledge of the related drug offense); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 498 U.S. 1081 (1991)

(state's desire to compensate crime victims was laudable, but its efforts violated the first amendment); *Minnick v. Mississippi*, 498 U.S. 146 (1990) (right to counsel during police interrogation); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (city's effort to remedy past discrimination was nevertheless a violation of the equal protection clause). The essence of constitutional protection is a declaration that, no matter how high-minded the goal, there are some things that a government simply may not do.

In the final analysis, this court must determine what place property rights have in the constitutional hierarchy. This Court has recognized the interplay between property rights and other civil rights. "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

In fact, property well may be considered the foundation for the other civil rights that we enjoy. John Locke, whose writings influenced the leaders of the American Revolution and the framers of the Constitution more than any other single philosopher, described the preservation of property as "the end of government, and that for which men enter into society." John Locke, *Of Civil Government* ¶ 138, quoted in Epstein, *Takings: Private Property and the Power of Eminent Domain* 14 (1985). Locke even went so far as to say, "Lives, Liberties, and Estates, which

I call by the general Name, *Property*." Locke, *The Second Treatise of Government* § 123 (revised ed. P. Laslett ed. 1965) (emphasis in original).

This case presents this Court with the opportunity to declare whether property rights have equal stature with all other constitutional rights, or whether they are simply an interesting nostalgic footnote. The interpretation of the Supreme Court of Oregon, if it stands, will relegate traditional property rights to the pages of history books, where they will become merely a backdrop for the state's power to legislate without liability.

CONCLUSION

For all of the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the Supreme Court of the State of Oregon.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,
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v.

CITY OF TIGARD,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Oregon

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, RICHARD K. EHRLICH, AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF FLORENCE DOLAN

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, RICHARD K. EHRLICH, AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF FLORENCE DOLAN

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF), Richard K. Ehrlich, and the Building Industry Association of Washington (BIA-Washington)

respectfully submit this brief amicus curiae in support of appellant Florence Dolan. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the nation and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992).

Richard K. Ehrlich is a property owner who, as a condition for a permit to build condominiums, was required to pay a $280,000 fee to help finance Culver City's public recreation facilities. Mr. Ehrlich was singled out to pay this fee because the land on which he desired to build condominiums formerly housed a private health club. Additionally, the city required the payment of a $33,220 fee to fund its "art in public places" program. The city assessed

the arts fee in violation of First Amendment Free Speech guarantees as well as the Takings Clause. While Mr. Ehrlich is required to subsidize the art, the artist maintains ownership and the city decides what art (and what message) will be displayed. The California Court of Appeal upheld these exactions without requiring a demonstration that they were designed to mitigate any public burden created by Ehrlich's project. *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737 (1993), *petition for writ of certiorari filed* November 24, 1993. Mr. Ehrlich's case represents a California court's misinterpretation of *Nollan's* requirement that an "essential nexus" exist between the public burden caused by the project and the exaction. The misinterpretation of this necessary close relationship (essential nexus) is one of the critical issues in Mrs. Dolan's case now before this Court (the other critical issue being the required application of heightened scrutiny).

The Building Industry Association of Washington is a federation of regional and local associations representing over 4,600 members engaged in commercial and light industrial construction and the building of most of Washington's residential housing. The interest of BIA-Washington in this case is to ensure that government exactions levied on construction projects in the permit process are fairly imposed and predictable. The case at bar directly calls into question how direct and substantial the nexus must be in order to impose conditions on a construction project. Accordingly, the ruling in this case will have substantial ramifications for the construction industry and the interests of BIA-Washington members.

Amici seek here to augment the argument in the petition for writ of certiorari. PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. Mr. Ehrlich's personal experiences and BIA-Washington's practical knowledge of the hurdles local governments erect for

developers provide further viewpoints on these issues that may be helpful to this Court.

This case, like *Nollan*, raises the question of whether a condition requiring dedication of land in exchange for a building permit can be harmonized with the Fifth Amendment's Takings Clause when the exaction bears no discernible relationship to an impact created by the building project.[1] Some local and state governments, such as the City of Tigard and Culver City, as well as some courts acknowledge only the bare existence of the *Nollan* decision. Instead of following the guidelines set forth in that case, however, they attempt to avoid it, purportedly by distinguishing *Nollan* as to its facts, or claiming alternatively that *Nollan* applies only to "possessory takings" or only to permit exactions of interests in real estate rather than cash.

Amici believe the opinion below directly conflicts with this Court's decision in *Nollan* and other regulatory takings cases. If allowed to stand, the opinion below will constitute a serious setback for individual rights by undermining the constitutional prohibition against taking private property without just compensation. This result would abridge fundamental notions of fairness and equity by unconscionably tipping the constitutional balance in favor of the state's regulatory power over the rights of the individual.

STATEMENT OF THE CASE

Florence Dolan owns a plumbing supply store in the City of Tigard, Oregon. She applied to the city for a permit to replace her existing store with a new, expanded store (a use contemplated by and fully within zoning requirements for

[1] Richard Ehrlich's case represents the corollary to that issue: whether the same analysis applies to an exaction of money or fees imposed in exchange for a building permit under the Fifth Amendment's Takings Clause.

the site). The city informed Mrs. Dolan that she could have the permit on two conditions. First, she would have to dedicate a 15 foot wide strip of land to the city for use as a greenway easement running along Fanno Creek. This dedication requirement comprised about 7,000 square feet, or approximately 10% of Mrs. Dolan's parcel. Second, she would have to dedicate an additional eight foot wide strip adjacent to the greenway for a pedestrian/bicycle pathway.

The greenway easement was required so as to further the objectives of the city's Master Drainage Plan which called for public improvements related to increasing the flow efficiency of Fanno Creek. Indeed, the city's final order on Mrs. Dolan's request for a variance stated that dedication of the easement was "imperative" to accomplishing these public improvements. Petition for Writ of Certiorari Appendix A (App.) at A-22.

Similarly, the bicycle path easement was imposed so that there would not be a break in the planned continuous pathway called for in the city's Parks Master Plan and the Tigard Area Comprehensive Pedestrian/Bicycle Pathway Plan 1974. The city's order denying a variance again reveals the rationale.

> "It is imperative that a continuous pathway be developed in order for the paths to function as an efficient, convenient, and safe system. Omitting a planned for section of the pathway system, as the variance would result in if approved, would conflict with Plan purposes and result in an incomplete system."

App. at A-22 (citing Final Order No. 91-09PC at 9-22 (1991)).

In reviewing these conditions, the Oregon Supreme Court held that the conditions were "reasonably related" to the proposed development and therefore did not effect a taking without compensation in violation of the Fifth

Amendment. The court determined that *Nollan's* "essential nexus" requirement was satisfied since a larger store would increase impervious surface area and therefore presumably would increase the amount of storm water runoff into Fanno Creek. Similarly, the court was persuaded that an expanded plumbing supply business would increase the transportation needs of employees and customers and the bicycle pathway was an alternative means of transportation which could lessen traffic congestion. App. at A-16-A-17.

Significantly, the court upheld these dedication requirements as being "reasonably related" to the project even though the city had no site-specific studies or other evidence to show that Mrs. Dolan's project would cause any significant, or even measurable, drainage problems on Fanno Creek. Likewise, there was no factual showing whatsoever of increased traffic congestion related to the anticipated store expansion or whether a bicycle path would in any way alleviate traffic coming to the plumbing supply store. Nevertheless, the tenuous (and speculative) link was considered by the Oregon court to be sufficient to justify taking 10% of Mrs. Dolan's property for a drainage greenway easement and an additional 8 foot strip for a bicycle pathway.

SUMMARY OF ARGUMENT

The Oregon Supreme Court erred in its analysis and application of this Court's takings law decisions, specifically *Nollan v. California Coastal Commission*. A condition on a building permit should be uniquely and specifically attributable to the burdens created by a proposed development. This promotes the underlying policy of requiring local governments to pay for the services they wish to offer rather than imposing the whole cost on a few property owners whose proposed developments unfortunately abut proposed public improvements. Contrary to the rulings

of this Court, the Oregon Supreme Court failed to require that building permit conditions mitigate burdens uniquely and specifically attributable to the proposed development, thus giving the green light to local governments seeking to acquire private property without paying just compensation. The court below denied Mrs. Dolan compensation for the portion of her land taken by the government, even while it failed to find an essential nexus between the burdens created by Mrs. Dolan's project and the need for a pedestrian/bicycle pathway or a floodplain greenway.

Moreover, despite *Nollan*'s requirement that courts apply heightened scrutiny to regulatory takings claims (reiterated in *Yee v. City of Escondido,* 503 U.S. ___, 118 L. Ed. 2d 153 (1992), and *Lucas*), the Oregon Supreme Court deferred entirely to the so-called findings made by a local land use regulatory agency. Unfortunately, the Oregon court is not the first to misconstrue *Nollan* in this manner. Jurisdictions' widely varying interpretations of *Nollan*, some of which are in line with that seminal case and others which declare the case virtually irrelevant, have added to the confusion of determining the proper standard. For the reasons described below, the decision of the Oregon Supreme Court should be reversed and this Court should expressly hold that lower courts must apply heightened scrutiny to regulatory takings claims to assure that conditions imposed on property owners have an essential nexus uniquely and specifically attributable to the burdens created by the proposed development.

ARGUMENT
I
A CONDITION ATTACHED TO A BUILDING PERMIT SHOULD BE UNIQUELY AND SPECIFICALLY ATTRIBUTABLE TO THE BURDENS CREATED BY THE PROPOSED DEVELOPMENT

The City of Tigard determined that property having the general character and located in the general vicinity of Mrs. Dolan's store should be used to provide bicycle and pedestrian pathways and open space for the public good. App. at A-7-A-8. This finding may be legitimate but, unfortunately, the city decided to further these public goals at the sole expense of the property owners whose property lies nearest to the sites of the city's plans. Singling out particular property owners to bear burdens rightly borne by the public as a whole violates the Takings Clause of the Fifth Amendment of the federal Constitution. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As demonstrated below, the evolution of takings analysis in response to such governmental overreaching requires that permit conditions mitigate only those adverse societal burdens uniquely and specifically attributable to the proposed development.

A. Nollan v. California Coastal Commission Provides the Ground Rules for Analyzing Permit Conditions Challenged as Takings

Nollan noted the existence of a bright-line test: if a regulation does not "substantially advance"[2] a legitimate

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[2] [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the (continued...)

state interest, there is a taking. *Nollan*, 483 U.S. at 834 (citing one of two independent tests in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).[3] This Court explained that a regulation in the form of a permit condition meets this "'substantially advance'" requirement if two prerequisites are met: first, the government must be able to deny the permit outright due to the harm caused by the project.[4] Second, the "permit condition [must] serve[ ] the same legitimate police-power purpose as a refusal to issue the permit." *Nollan*, 483 U.S. at 836. This second prerequisite can be interpreted to mean that the permit condition may only be imposed to mitigate harms created by the particular permitted development, those harms being the same ones that would justify denial of the permit. *Id.* at 837. These two

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[2] (...continued)
contrary, our verbal formulations in the takings field have generally been quite different. We have *required* that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 835 n.3 (citations omitted; emphasis added and in original).

[3] The other bright-line test is the "economically viable use" test which is met when a regulation destroys all economically beneficial or productive use of property. *Agins*, 447 U.S. at 260; *Lucas*, 120 L. Ed. 2d at 813.

[4] If the denial would cause a drastic reduction in the value of the property the condition might constitute a taking. *Nollan*, 483 U.S. at 835-36.

prerequisites are often referred to collectively as the "essential nexus" requirement. *Id.* at 837.

Unfortunately, this Court left ambiguous the question as to how tight a nexus must exist between the condition and burdens created by the proposed development. In *Nollan*, this Court cited cases that employed nexuses ranging from "rational relationship" to "uniquely and specifically attributable." *Id.* at 839-40 (citing, *inter alia*, *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981) (rational relationship), and *Pioneer Trust & Saving Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961) (uniquely and specifically attributable)). After this perusal of case law, this Court held that whatever the standard of nexus, the California Coastal Commission's requirements could not pass constitutional muster. *Nollan*, 483 U.S. at 841. To promote greater uniformity of the courts on this extremely important issue, this Court should clarify that the uniquely and specifically attributable nexus is required to protect the constitutional right to receive just compensation for a governmental taking of private property.

B. Traditional Takings Analysis as Well as the Nollan Analysis Demonstrate that the Permit Condition in This Case Results in a Taking

The first question to be addressed is whether under a traditional takings analysis the exaction would constitute a taking. Here, were the city to condemn 10% of the property by a fee simple dedication, Mrs. Dolan would unquestionably be compensated for a taking. The second question is whether, under a traditional takings analysis, the denial of the permit outright would constitute a taking because it deprives the property of economically viable use. *Agins*, 447 U.S. at 260. Even if the permit were denied, Mrs. Dolan would retain the use of the original plumbing supply store. Therefore, denial of the permit to build a larger building would not be a taking so long as the reasons

for the denial of the permit substantially advance a legitimate state interest.

These questions only begin the analysis, however. Under *Nollan*, the "substantial advancement of a legitimate state interest" test is employed to ensure that the government is in fact regulating to avoid adverse public consequences and is not using the regulatory power to acquire property by coercion. This is the central holding of *Nollan*, 483 U.S. at 837 (when "evident constitutional propriety disappears" then the regulation becomes "'an out-and-out plan of extortion'").

The local government must establish the required essential nexus by demonstrating that a particular project has caused a harm to the community which is significant enough to justify denial of the permit. As an alternative to the denial, government may then grant the permit with specific conditions designed to ameliorate the harm.

Courts are intended to view infringements on property rights very seriously. As the *Nollan* Court warned:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.

Nollan, 483 U.S. at 841. This Court reiterated this cautionary message in *Lucas*, 120 L. Ed. 2d at 819 n.12, which warned that "artful ... characterizations" would be insufficient to demonstrate substantial advancement of a legitimate state interest.

Disregarding the plain teachings of this Court, the Oregon Supreme Court declined to apply any meaningful scrutiny to the permit conditions at issue. The court below merely identified a preexisting public need or purpose and determined that imposition of the land exaction would serve that purpose.

Because the exaction gives the government property it would otherwise have to pay for, the city has a specific, direct interest in creating the appearance of regulation to hide its intention to circumvent the Takings Clause in acquiring the property. The nexus standard must require that the condition be tied to burdens uniquely and specifically attributable to the proposed development. Only this standard is sufficiently rigorous to penetrate a deliberately deceptive facade of regulation.

C. The Oregon Supreme Court's Failure To Require That Conditions Mitigate Burdens Uniquely and Specifically Attributable to the Proposed Development Gives the Green Light to Local Governments Seeking To Acquire Private Property Without Paying Just Compensation

Missing from the Oregon Supreme Court's decision is any analysis of whether the City of Tigard would be justified in denying Mrs. Dolan's permits on the basis of increased bicycle or pedestrian traffic or increased need for storm drainage. A bicycle and pedestrian path as well as more storm drainage are presumably legitimate interests of the City of Tigard. However, making Mrs. Dolan contribute to these interests is legitimate only if denial of the permits would be justified on the ground that the project would actually interfere with these interests.

The court below justifies its minimal analysis by finding that *Nollan* only imposes a "reasonable relationship" standard (rather than a substantial advancement standard) for determining the permissibility of imposing conditions responsive to the impacts of particular developments. App. at A-13-A-14. The court justifies this standard by reference to two Ninth Circuit Court of Appeals' decisions: *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), and *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 118 L. Ed. 2d 593 (1992). *Parks*, of course, predates *Nollan*. Nevertheless, it actually employed an analysis which considered whether the project actually caused any harm or public burden which the conditions imposed on the project by the city would mitigate. The court found no causal relationship whatsoever.[5] As discussed *infra* at 20-21, *Commercial Builders* misinterpreted *Nollan* by refusing to acknowledge the enhanced standard of review mandated by this Court's opinion.

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[5] In *Parks v. Watson*, 716 F.2d 646, a property owner sought to have a city vacate platted but unbuilt streets so apartments could be built. The city agreed to "vacate" the nonexistent streets only on the condition that the property owner give to the city property containing valuable geothermal wells. The court quickly concluded that the city's desire to own the geothermal wells did not entitle it to extort dedication of the wells because of the fortuitous appearance of their owner seeking a permit to undertake activity unrelated to geothermal wells:

> Since the requirement that Klamath Valley Company give its geothermal wells to the City had no rational relationship to any public purpose related to the vacation of the platted streets, the unrelated purpose does not support the requirement that the company surrender its property without just compensation. ... The condition violates the fifth amendment.

Parks, 716 F.2d at 653.

1. The Court Below Did Not Find an Essential Nexus Between the Burdens Created by Mrs. Dolan's Project and the Need for a Pedestrian/Bicycle Pathway

In this case, heightened scrutiny will bear out the fact that no nexus (much less an essential one) exists between the city's conditions of a greenway and pedestrian/bicycle pathways and the impacts to be created by Mrs. Dolan's expanded plumbing supply store. The city provided no data or information and conducted no study whatsoever to support its conclusions. Instead, the city simply made deductions and assumptions based on its own sense of logic and nothing more. The city's findings stated:

> It is reasonable to *assume* that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. ... In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

App. at A-5 (emphasis added).

The fact that the pathway *could* be used is nothing more than supposing that having a pathway is a good idea and will benefit Mrs. Dolan's customers and employees, as it will benefit every other citizen of the City of Tigard. The findings of fact that the bicycle pathway system "'*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset

some of the traffic demand." App. at A-25 (Peterson, J., dissenting) (emphasis in original). Moreover, even the assumption of additional burden on traffic thoroughfares is speculative. The city has produced no studies demonstrating that the city's current traffic arteries are insufficient to handle whatever additional traffic congestion may result from the existence of a larger plumbing supply store.

Certainly, the City of Tigard could not have denied Mrs. Dolan's permit on the grounds that her customers' and employees' recreational needs were not being met. No nexus or reasonable relationship exists between the new development of an enlarged plumbing supply store and its customers' recreational needs. The city theoretically should have shown (if possible) that it could have denied Mrs. Dolan's permit on the ground that her project would increase traffic. The city should have further demonstrated that as an alternative to denying the permit, the bicycle/pedestrian pathway funded by Mrs. Dolan would do no more than alleviate the traffic congestion caused by her project. So far, the City of Tigard's articulations have shown a presumed connection which is nothing more than "an exercise in cleverness and imagination." *Nollan*, 483 U.S. at 841.

2. The Court Below Did Not Find an Essential Nexus Between the Burdens Created by Mrs. Dolan's Project and the Need for a Floodplain Greenway

In regard to the floodplain dedication, the court below relied on the city's findings that

> "[t]he increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods

> of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes."

App. at A-6. This finding only acknowledges that the City of Tigard has an existing problem with this drainage basin and the enlarged store and parking lots' increased surface area *could* add to this problem. As Justice Peterson noted in dissent, the contribution of this project to runoff may be only a "thimbleful." App. at A-26 (Peterson, J., dissenting). The city must show that the granting of the permit will create specific problems, burdens, or conditions that previously did not exist. The city must then show that the exaction will serve to alleviate the specific problems, burdens, or conditions that will arise from the granting of the permit. General statements of concern about increased traffic or public safety are insufficient to support, as permissible regulation, what otherwise would be a taking. App. at A-18-A-19 (Peterson, J., dissenting).

In the present case, the city's desires to construct a greenway and bike trails are totally unrelated to any burden created by Mrs. Dolan's proposed expansion of her plumbing supply store. When the city's exactions are subjected to the heightened scrutiny required by *Nollan*, it is apparent that its actual purpose is identical to that of the condition demanded by the California Coastal Commission: "[T]he obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." *Nollan*, 483 U.S. at 837. The government must show much more than a theoretical nexus; it must show that the condition will mitigate societal burdens uniquely and specifically attributable to the proposed development.

II
NOLLAN V. CALIFORNIA COASTAL COMMISSION REQUIRES COURTS TO APPLY HEIGHTENED SCRUTINY

A. This Court's Decisions Have Uniformly Required Heightened Scrutiny of Regulatory Takings Claims

Whatever nexus requirement is used, the next step in the analysis is how courts should review the determination by the local government that it has met the required nexus. In *Nollan*, this Court reviewed the nexus with "particular care[]" because of the risk that the government's purpose "is avoidance of the compensation requirement, rather than the stated police power objective." *Nollan*, 483 U.S. at 841. This "particular care[]" has been described by courts and commentators as heightened scrutiny. *See, e.g., Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1068 (N.Y.), *cert. denied*, 493 U.S. 976 (1989); Lawrence Berger, Inclusionary Zoning Devices as Takings: *The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186, 210 (1991) ("[i]t was Justice Scalia's use of the language of intermediate heightened scrutiny, in connection with a takings analysis ... that marks the importance of the *Nollan* case"). Courts must apply heightened scrutiny to the facts to confirm that the standard was met. This heightened scrutiny requires a degree of proof by the government agency rather than simply an "exercise in cleverness and imagination" or a mere "pleading requirement." *Nollan*, 483 U.S. at 841. When courts apply heightened scrutiny, local governments will be unable to create an artificial appearance of legitimate regulatory conduct to cover their action in acquiring property for other purposes.

It all comes down to a simple point: The city wants pathways and greenway easements and it wants someone else to pay for them. *Nollan's* nexus requirement should not be

transmuted into a rule of the convenient patsy. Application of heightened scrutiny will assure this does not happen.

B. Jurisdictions' Widely Varying Interpretations of Nollan Have Added to the Confusion over the Proper Standard

1. Some Jurisdictions Have Correctly Described and Applied the Nollan Standard

a. The New York Court Demonstrated Correct Understanding and Analysis of Heightened Scrutiny Under Nollan

The New York Court of Appeals struck down a law requiring the imposition of a monetary exaction on hotel owners who wanted to stop using their hotels as single room occupancy, low rent housing. The court held:

> [Regulatory takings challenges require] "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in *Nollan*.

Seawall Associates v. City of New York, 542 N.E.2d at 1068. Analyzing the law, the court noted that the city's asserted nexus between the obligation placed on the property owners and the state interest was "indirect at best and conjectural." *Id.* at 1069. The conjectural nature of the connection was so tenuous that the court found it could not justify singling out the property owners to bear the costs of curing a larger societal ill--in that case, homelessness. *Id.* In the case now before this Court, the speculative musings of the City of Tigard are insufficient to demonstrate the required essential nexus.

b. The New Jersey Court Correctly Stated Nollan's Heightened Scrutiny

The New Jersey Supreme Court has also explicitly recognized the heightened scrutiny requirement of *Nollan*:

> [T]he United States Supreme Court has acknowledged that the "rationality" standard determinative of substantive-due-process challenges to State regulation is less stringent than the "takings" standard, which requires that the taking "substantially advance" the State interest to be achieved.

In the Matter of the "Plan for Orderly Withdrawal from New Jersey" of Twin City Fire Insurance Company, 609 A.2d 1248, 1259 (N.J. 1992), *cert. denied*, ___ U.S. ___, 122 L. Ed. 2d 370 (1993) (citing *Nollan*, 483 U.S. 825).

c. A California Court Has Similarly Recognized the Heightened Scrutiny Requirement

Even California--whose courts were singled out in *Nollan* as particularly hostile to property rights[6]--has produced a decision acknowledging and applying the enhanced standard that *Nollan* requires.

> Nollan ... changed the standard of constitutional review in takings cases. Whether the new standard is described as "substantial relationship," or "heightened scrutiny," it is clear the rational basis test ... no longer controls.

Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260, 1270 (1991) (footnotes omitted). This California Court of Appeal decision provides a good example of a court properly applying the *Nollan* test to conditions imposed on a permit to place a revetment on oceanfront property. The plaintiff challenged the dedication of an easement for public access along the beach. In evaluating these conditions, the court reviewed generic studies relied on by the Coastal Commission which indicated

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[6] *Nollan*, 483 U.S. at 839.

that such revetments "typically exacerbate erosion of the beach in front of them." *Surfside Colony*, 226 Cal. App. 3d at 1265. Nevertheless, the Court of Appeal concluded that the dedication condition effected a taking of the property because

> the Commission had no evidence at all establishing *this* revetment would cause erosion at *this* beach.
>
> We must therefore conclude no substantial evidence exists to justify a "nexus" between the revetment and the public access requirement. Under *Nollan* the access requirement must be deemed a "taking" of Colony's property.

Id. at 1269 (emphasis added). The court in *Surfside* understood that *Nollan* requires far more than an assumed relationship between the condition and the need created by the development. Because the "nexus" between the actual development and the condition must be substantial, the court concluded that "[w]ithout any site-specific evidence supporting the Commission's decision, we cannot say the Commission had 'substantial evidence' justifying the need for an easement over Colony's property." *Id.* at 1272.

2. Other Jurisdictions Have Misanalyzed, Misinterpreted, and Misapplied the Nollan Standard of Review

Recently, some lower courts (especially the Ninth Circuit) have blatantly misinterpreted *Nollan*. For example, in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, instead of comparing the permit condition (a fee to fund low-income housing) and the applicants' projects (commercial buildings), the Ninth Circuit Court of Appeals deferred to the city "because we find the Ordinance sufficiently related to the legitimate purpose it seeks to achieve" (*i.e.*, "expanding low-income housing"). *Id.* at 873.

The relationship which that court found sufficient departs from the *Nollan* doctrine. As previously noted, *Nollan* requires courts to find a constitutional nexus between the permit condition and the applicant's proposed project in order to determine whether the condition is truly remedial of adverse impacts caused by the project. Yet, the *Commercial Builders* court wrote:

> Prior to *Nollan*, other federal courts ... upheld ordinances placing restrictions or conditions upon development where the ordinances were reasonably related to legitimate public purposes.
>
> ....
>
> As a threshold matter, we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to this Ordinance.

Commercial Builders, 941 F.2d at 874.

In an even more troubling ruling, one California court (attempting to reconcile *Commercial Builders* with the fact that *Nollan* does require heightened scrutiny) proclaimed that *Nollan* does not apply to regulatory takings cases at all. *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, 170, *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 135 (1992). In *City and County of San Francisco v. Golden Gate Heights Investment*, 14 Cal. App. 4th 1203, 1209 (1993), *cert. denied*, ___ U.S. ___, 1993 WL 323192, the California Court of Appeal also characterized *Nollan* as a physical takings case. *Id.* at 1209. In support it cited *Blue Jeans Equities* and inexplicably *Yee*, 118 L. Ed. 2d at 167. *Yee*, of course, found the exact opposite. *Id.*

The California courts, with the exception of *Surfside Colony*, discussed *supra*, have continued unabated their pattern of misinterpretation of Nollan's requirements. Amicus Richard Ehrlich has been the victim of one such

opinion which managed to find a justification for the imposition of a $280,000 recreation fee and a $33,220 arts fee.[7] *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737. In *Ehrlich*, the inherent vice of the California Court of Appeal's decision is its conclusion that conditions requiring exactions are acceptable if they (1) advance a legitimate governmental interest and (2) leave a property owner with economically viable use. In reaching this conclusion, the court did not require any showing that the exaction was designed to mitigate any public burden created by the project itself. Indeed, the court stated that the "fee was not imposed as a condition relating to the development project's burden on the community for increased community services," but only because of a "benefit conferred" and the burden from the loss of nonexistent recreational facilities. *Id.* at 1749-50. This reasoning, and the necessary conclusion resulting from it, directly conflict with this Court's mandate in *Nollan*. To return property rights jurisprudence to the right track, this Court should expressly hold that fair application of the Takings Clause requires courts to use heightened scrutiny to

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[7] The arts fee is particularly egregious in its twofold attack on individual constitutional rights. Not only does it violate Mr. Ehrlich's guarantee of just compensation for a regulatory taking, but it also violates Mr. Ehrlich's right of free speech by turning him into a private endowment for the arts. Under the First Amendment, Ehrlich has the right to refuse to subsidize artistic speech with which he disagrees. *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters--to take a nonexhaustive list of labels--is not entitled to full First Amendment protection" (footnote omitted)); *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990).

examine governmental regulations or conditions which adversely impact private property rights.

III
POLICY CONSIDERATIONS REQUIRE STRICT ADHERENCE TO NOLLAN

The right to make reasonable use of property, free from extortive governmental demands, involves a matter of individual liberty and a basic civil right which should be jealously guarded by the courts:

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation ... is in truth a "personal" right .... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

The importance of this case is found both in the breadth of its impact and the nature of the issues raised. Even beyond its clear conflict with the standards laid down by this Court in *Nollan*, the city's actions violate the Takings Clause by requiring petitioner alone to bear what should rightfully be a general public burden. In addition to examining the nature of the state action embodied in land use regulations, and its economic impact on property owners, this Court has assigned unique significance to this question of fundamental equity. As noted *supra*, but worthy of reiteration, "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by

the public as a whole.'" *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 364 U.S. at 49). Any presumed benefits of the pedestrian/bicycle pathway and greenway would accrue to the community as a whole. It follows as a general principle of constitutional law that the costs of constructing these pathways and greenways, *including the cost of acquiring the right of way*, must be financed out of general public revenues. The city is prohibited under the Fifth and Fourteenth Amendments of the United States Constitution from requiring individual property owners to bear the costs of its land acquisition program.

In *Nollan*, the Coastal Commission wanted access to the Nollans' beach as part of a comprehensive program to provide continuous public access along Faria Beach as the adjacent lots underwent development or redevelopment. *Nollan*, 483 U.S. at 841. If "Fanno Creek" were substituted for "Faria Beach" and "storm water management and greenway purposes" for "continuous public access," the parallels between *Nollan* and *Dolan* become blatant. This Court's response to the Coastal Commission's justification was that California "is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' ... but if it wants an easement across the Nollans' property, it must pay for it." *Nollan*, 483 U.S. at 841-42 (citations omitted). Oregon apparently needs the same message spelled out for it.

With respect to takings jurisprudence, courts struggle with two essentially opposing tendencies. First is a tendency to recognize the legitimacy of attempts by government to regulate property in ways that once might have been unthinkable. App. at A-26-A-27 (Peterson, J., dissenting). The second tendency (a corollary of the first) is for state and local governments to attempt to further particular goals by conditioning the uses of private property. Property owners are denied their rights to build unless they "dedicate" some portion of their property to support the particular government

program. Governments, therefore, face strong temptations, particularly in times of limited tax revenues, to place the primary burden for funding projects on the shoulders of those whose private property happens to be in the neighborhood of the proposed projects.[5] As Justice Peterson eloquently stated in his dissent:

> The trouble is, what once would have been recognizable as extortion may turn, in time, into something considered benign because it is so familiar. That transmogrification is encouraged every time a court cannot distinguish whether a particular governmental regulation falls within the ambit of the second tendency, rather than the first.
>
> ... The findings relating to the need for exactions arising from future increased intensity of use after the property is developed must establish more than a *potential* increase in intensity; they must establish more than *some* increase in intensity; they must establish a bona fide need for the extraction that arises from the development.

App. at A-28 (Peterson, J., dissenting) (emphasis in original).

The only "impediment" to the city's completion of its planned greenbelt and bicycle pathways after construction of Mrs. Dolan's expanded store is the same one which existed before: the land is privately owned. But this Court concluded in a classic opinion that the "impediment" can

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[5] The regulatory takings analysis applies to all types of takings; permit conditions requiring outright dedications, easements, or fees.

only be removed by the constitutional means of purchasing access:

> The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. ... The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment. [Citation.] When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> ... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922).

The rejection of *Nollan's* heightened scrutiny requirement by the court below is more than a simple mistake in the application of federal constitutional law. Rather, it amounts to a denial of fundamental rights guaranteed by the United States Constitution. The appropriate standard of judicial review is not a mere procedural detail. In close cases, the level of scrutiny determines the outcome of litigation. *See* R. S. Radford, *Statistical Error and Legal Error*, 21 LOY. L.A. L. REV. 843, 870-79 (1988). In the context of regulatory takings, the level of scrutiny determines whether or not individual

property rights will be protected against predatory and confiscatory regulations.

Although *Nollan* explicitly set a heightened standard of review which must be applied to exactions imposed on building permits, lower courts have deliberately circumvented the language in *Nollan* to come to results that cannot be harmonized with that case. For the benefit of those courts which have yet to acknowledge and apply the required heightened scrutiny in takings cases, this Court should clarify this area of the law by reiterating that the *Nollan* analysis requires heightened scrutiny of permit conditions. Under that analysis, in order to pass Fifth Amendment muster, permit conditions must mitigate burdens uniquely and specifically attributable to the subject development.

CONCLUSION

For the reasons stated above, the decision of the Oregon Supreme Court failed to properly apply the takings law doctrines set forth by this Court and should be reversed.

DATED: January, 1994.

Respectfully submitted,

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(12)

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No. 93-518

In the

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD, OREGON,

Respondent.

On Petition for Writ of Certiorari
to the Oregon Supreme Court

BRIEF OF *AMICI CURIAE* JON A. CHANDLER IN SUPPORT OF PETITIONER

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January 12, 1994

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QUESTION PRESENTED

Does the City of Tigard's conditioning its approval of a land use permit upon the Dolans' surrender of property rights constitute an unconstitutional condition?

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INTERESTS OF *AMICI CURIAE*

Common Ground: The Urban Land Council of Oregon is a council of the Home Builders Association of Metropolitan Portland ("HBAMP"), with a membership comprised of commercial, industrial, and residential builders and developers.

HBAMP is an affiliate of the National Association of Homey Builders, also an *amicus* in this case. HBAMP represents over 1,450 member firms in the Portland area, all of whom are involved in the residential housing industry in some capacity.

The written consent of the parties in this case has been obtained, and the letters of consent have been filed along with this brief.

The interest of these *amici* in this matter is profound. Not only does the case involve a city with whom many of the members of these *amici* do business, but it raises the broad question of the limits of local government's authority to exact land and improvements from those involved in the development of real estate. The membership of these *amici* are truly on the front lines of the battle between government power and individual freedom--for them, the issue is not one of esoteric political science but one that affects their ability to pursue their chosen occupations. Exactions of the sort required by the City of Tigard are not by any means uncommon, and yet very little guidance exists for developers and builders who wish to contest an onerous development condition. Too often, the decision whether or not to acquiesce to a governmental demand is based on bottom-line economics, not on the appropriateness of the exaction.

This Court's decision will, it is hoped, give these *amici* and others similarly situated some much needed protection against governmental overreaching in the land development approval process.

SUMMARY OF THE ARGUMENT

When this Court decided *Nollan v. California Coastal Com'n*, 483 U.S. 825 (1987), and reaffirmed the principle that government regulation that did not "substantially advance" a legitimate governmental purpose would be an unconstitutional taking, real estate and land use commentators and pundits welcomed the decision with reactions ranging from delight to panic, depending on their ideological viewpoints. Regardless of the perspective of the commentator, though, a common thread of the analyses was that *Nollan* represented a significant change in the way constitutional takings claims were going to be viewed.[1]

The post-*Nollan* case law, though, has not necessarily reflected the changes announced in that decision. In the case at hand, for

[1] *See, e.g.*, Best, *New Constitutional Standards for Land Use Regulation* (Pacific Legal Foundation Conference Paper, July 22, 1987); *President's Message*, Oregon Planner's Journal (July-August 1987).

example, the Oregon Supreme Court majority stated that in their opinion, *Nollan* did not actually change the analysis set forth in other decisions of this Court. *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993), Pet. App. A - 13-14.

This case presents the issue clearly: What standard does a development exaction have to meet to pass constitutional muster? The Oregon Supreme Court held that the "essential nexus" of *Nollan* is nothing more than a rephrasing of the "reasonable relationship" standard. Petitioners and these *amici* would argue that *Nollan* stands for the proposition that a higher level of scrutiny is required before governmental exactions will be upheld and that a greater connection between the exaction and the governmental cause supposedly being advanced must be demonstrated in order for the exaction to be constitutional.

At the heart of the *Nollan* nexus analysis is the concept of connectivity. It is not enough for government to demonstrate a temporal relationship between the development activity and the exaction being required; *Nollan* requires that the burden placed by means of a development exaction upon an individual property owner in pursuit of a greater public good must be directly connected to the impact created by that development. By way of illustration, an individual seeking a permit to build a deck in the backyard of their corner lot could not properly be required to install a stop light at the adjoining intersection, because there would be no connection between the permitted activity and the exaction being imposed. In the case at hand, there is not a great deal more connectivity than in this hypothetical, and the governmental exaction is similarly improper.

Also at issue in this case are the findings that must be made by government before imposing an exaction. Even if an essential nexus could be demonstrated in this case, the City of Tigard failed to articulate it. Moreover, the Oregon Supreme Court, by accepting the city's inadequate findings, failed to uphold its obligation to require government to prove its case by sufficient evidence prior to imposing a private burden for an ostensible public good. If the relaxed level of judicial review employed by the Oregon court is acceptable, then future takings cases will not need to be decided by justices on constitutional principles but by

clerks ticking off boxes on a form every time the appropriate phraseology is used.

I. THE TEST SET FORTH IN *NOLLAN* REQUIRES A HIGHER LEVEL OF JUDICIAL SCRUTINY THAN THE "REASONABLE RELATIONSHIP" TEST

This Court's decision in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), set forth the principle that a constitutionally impermissible taking occurs if government regulation either denies a property owner economically viable use of his or her property or if a regulation fails to substantially advance a legitimate governmental interest. *Id.* at 260. This formulation was repeated by this Court in numerous cases prior to the Court's revisit of regulatory takings in *Nollan*. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1980); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

The *Nollan* decision expanded and elaborated on the *Agins* holding by stating that "substantial advancement" of a governmental interest can be found only where there is an "essential nexus," *Nollan*, 483 U.S. at 837, between the governmental interest and the demand made upon the property owner. This required essential nexus is determined by examining the connection between the governmentally imposed condition and the burden placed upon the general public by the permit applicant. If the impact of the governmental condition is out of proportion to the burden imposed by the applicant's proposed project, then the essential nexus is not present and the permit condition is unconstitutional.

Notwithstanding the clear progression in this Court's takings doctrines, the Oregon court held that *Nollan* effected no change in the legal test to be applied to regulatory takings cases. *Dolan*, Pet. App. A-13. The plain language of *Nollan*, however, makes it clear that this Court intended judicial scrutiny of takings cases to be of a higher level than had been used previously. The interpretation made by the Oregon court would render *Nollan* not only legally insignificant but factually ludicrous: The statement in

Nollan that "our cases describe the condition for abridgment of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest" makes no sense if the end result is the "reasonable relationship" test. *Nollan*, 483 U.S. 841 (emphasis in original).

In reaching its conclusion that *Nollan* did not really mean what it said, the Oregon court first quotes *Nollan* for the proposition that the

> "constitutional propriety of an exaction disappears if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury."

The Oregon court then concludes:

> The quoted passage indicates that, for an exaction to be considered "reasonably related" to an impact, it is essential to show a nexus between the two, in order for the regulation to substantially advance a legitimate state interest . . . .

This convoluted exegesis by the Oregon court stands the language of *Nollan* on its head. The phrase "reasonably related" was certainly in common parlance when *Nollan* was decided; it is eminently reasonable to assume as a matter of legal interpretation that had this Court intended to use "reasonably related" as the operative test, it could and would have done so. It is further reasonable to assume, as have most courts with the notable exception of California and now Oregon, that when this Court used the words "essential nexus" where some grammatical variation of the phrase "reasonably related" could have been

expected to appear, the Court intended to convey a different meaning.

It is of course true that the precise meaning of "essential nexus" has yet to be established, but the Oregon court's exercise in looking glass logic ignores the fact that the phrase does have some intrinsic meaning and was not intended to be a flowery restatement of the old test. As one commentator put it:

> *Nollan* stopped short of creating a per se rule for title takes. Thus, in the balancing test, which weighs the importance of the governmental objectives against the economic harm or deprivation of investment-backed expectations, the court will simply apply a higher scrutiny to the governmental objectives. There is, therefore, no per se rule but a heightened scrutiny within the ad hoc factual inquiry balancing test . . . .

Freilich & Garvin, *Takings After Lucas: Growth Management, Planning and Regulatory Implementation Will Work Better Than Before*, AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 53-81 (1993) (emphasis added); *see also* Washburn, *Land Use Control, the Individual, and Society*, 52 Maryland L. Rev. 162, 174 (1993) (proper test for constitutionality post-*Nollan* is not rational relationship).

Furthermore, the Oregon court's decision contains a telling factual error, even granting that court the benefit of its own interpretation of the proper constitutional analysis. The court below says

> In *Nollan*, the Court stated that, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, then, tells us that an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve . . . .
>
> In this case, we conclude that city's unchallenged factual findings support the dedication conditions imposed by city.

Dolan, 317 Or. at 120-21 (citation omitted). Assuming for purposes of argument that the Oregon court's interpretation of *Nollan* is correct, the conclusion reached by that court does not flow from the facts of the case. If, as the Oregon court would put it, a reasonable relationship occurs if the "exaction serves the same purpose that a denial of the permit would," how is a reasonable relationship therefore present in this case? This case involves the exaction of land for a bicycle path and a storm water greenway; if the land use application in question were to have been denied, would either the bike path or the greenway have been built? The petitioners were in lawful possession of the land and were conducting a lawful business on the property. Had they, when presented with the city's exaction demands, simply chosen not to construct the proposed expansion of their business, the city would have had no legal means to compel them to donate either the land or the construction of the improvements on it.

A denial of the requested permit, in this instance, would *not* serve the same purpose as the exaction. This is not a case where the underlying governmental purpose is the avoidance of a public harm, but rather the affirmative accomplishment of a purported public good--denying the permit would accomplish nothing for the city or the public.

Given that what the city wanted to obtain by means of exaction was a bike path and greenway, and given that what they would obtain by denial of the permit was no bike path and no greenway, there was no "reasonable relationship" even by the Oregon court's own interpretation of the law. The court below not only misread *Nollan* but failed to follow its own syllogism and in the process aided and abetted Tigard's "'out-and-out plan of extortion.'"

Nollan, 483 U.S. at 837 (citation omitted). This point was central to the dissent of Justice Peterson in the Oregon court.[2]

II. THE *NOLLAN* TEST REQUIRES THAT A CONNECTION BE PRESENT BETWEEN PUBLIC BENEFIT AND PRIVATE HARM

The facts of this case involve an existing business that wished to expand its operations by tearing down the existing store and constructing a larger new one on the same 1.67 acre site. To accomplish these objectives, the owners of the business had to have their plans reviewed by the city and needed to obtain a building permit. Pet. App. J-3. Although no change of use was contemplated, no additional land was to be acquired, and no rezoning or comprehensive plan change was required, the city used the development approval process to require as a condition of development that the petitioners dedicate some 7,000 square feet of their property to the city for a greenway and a bicycle path adjacent to the greenway.

Before the city can constitutionally impose these requirements on the property owner, there must be a connection between the governmental exaction and the public burden imposed by the

[2] The dissent concluded as follows:

> From reading the order in this case, I am convinced that Tigard decided that it needed a pedestrian/bicycle pathway and a flood control greenway easement along Fanno Creek. One way of getting these, free of cost, is by requiring all owners who propose to change the use of their property to convey the easements to the city. This is what happened in this case.
>
> The findings here do not establish any cognizable remediable purpose attributable to the change in use. The conditions relating to the pedestrian/bicycle pathway and flood control and greenway easements are impermissible on the record made in this case.

Dolan, 317 Or. at 130.

property owner. This is the crux of *Nollan's* "essential nexus" requirement:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. . . . [O]ur cases describe the condition for abridgment of property rights through the police power as a "substantial advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction . . . .

Nollan, 483 U.S. at 841 (emphasis in original).

The "substantial advancement" of a state interest in the case at bar would require that Tigard's exaction demands of the property owners be directly and proportional to the request being made by those owners of the city. This did not occur. There is not an "essential nexus" between the exactions and the permit application; the conditions demanded consequently do not "substantially advance" any governmental interest.

A review of the record at the local level illustrates this contention. In its final order, the city made findings as follows:

> "[T]he [City of Tigard Planning] Commission finds that the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of

the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

. . . .

"[T]he Commission finds that the required dedication [of the greenway] would be reasonably related to the applicant's request to intensify the usage of this site, thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek . . . . The anticipated increased storm water flow from the subject property to an already strained creek and drainage basis can only add to the public need to manage the stream channel and floodplain for drainage purposes."

Dolan, 317 Or. at 113-14 (emphasis added).

These findings were cited approvingly by the *Dolan* majority, yet there is nothing in these findings that approaches the Oregon court's "reasonable relationship," much less the "essential nexus" required by this Court. Instead, these findings consist of suppositions and conjecture.

The city says that it is "reasonable to assume" that customers and employees of the future uses of the site could use the bike path for their business and recreational needs and states that the path "could" result in more pedestrians and bicyclists and fewer

automobiles. It is important to keep in mind that the land use in question is a plumbing and electrical store--does the city really believe that patrons of the store will ride their bicycles and carry bathtubs home on their heads? In any event, an assumption, reasonable or not, cannot provide a proper basis for taking property away from a citizen; the recreational needs of patrons cannot form a valid basis on which to judge a commercial development application; an unknown number of pedestrians and bicyclists cannot be used to justify this exaction. And finally, blatant bootstrapping should have no place in constitutional inquiries of this nature--the bicycle parking used to justify the imposition of the bike path condition was itself *required by the city as a condition of development*. This is akin to cutting off a man's leg and then firing him for limping.

Similarly, the local record quoted above justifies the exaction for the greenway with expectations and anticipations, but in neither instance does the city provide any hard factual evidence that the development being proposed creates a need for the bicycle path or the greenway. The test set forth by this Court--that development exactions must "substantially advance" a legitimate governmental interest and that an "essential nexus" must be demonstrated--must not be fulfilled by a record that contains nothing more than suppositions and surmises. Rather, should these exactions be allowed to stand on the facts presented in this case, the proper constitutional fit for regulatory takings would be neither "reasonable relationship" nor "essential nexus," but "close enough."

CONCLUSION

It is significant that no one in this case, whether a party or an *amicus*, is quibbling over the starting assumption that the greenway and the bike path are legitimate governmental interests. Those of us who live and do business in Oregon are proud of our environment and our quality of life. Your *amici* have supported local and statewide planning efforts that enhance environmental protection and the reduction of automobile travel. The issue, though, for us, and all engaged in the land development industry,

is not whether governmental purposes are laudable, but whether we are being asked to bear a disproportionate share of the burden in accomplishing them. In the instant case, the city could have either proved and quantified its assertions--that the development would increase storm water runoff into the stream or that completion of the bicycle path would result in a definite number of autos being off the highways--or it could have purchased the property in question, either through condemnation or through voluntary means such as a local improvement district.

What the city cannot be allowed to do, though, is place the entire burden of providing a public benefit on a property owner without demonstrating the necessary connections. Such actions, particularly when they are supported not by findings but by guessings, threaten not only the rights of property owners but also all who make a living improving or selling real estate. The U.S. Constitution and this Court can provide some protection against governmental overreaching, but only if actions such as those engaged in by the City of Tigard and endorsed by the Oregon court are emphatically disapproved.

We therefore respectfully request that this Court reverse the decision of the Oregon Supreme Court.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

FLORENCE DOLAN, Petitioner,
v.
CITY OF TIGARD, OREGON, Respondent.

On Writ of Certiorari to the
Oregon Supreme Court

BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NAIOP-THE ASSOCIATION FOR COMMERCIAL REAL ESTATE, NATIONAL REALTY COMMITTEE, NATIONAL MULTI HOUSING COUNCIL, NATIONAL APARTMENT ASSOCIATION, AND AMERICAN SENIORS HOUSING ASSOCIATION IN SUPPORT OF THE PETITIONER

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CASES: **Page**

Agins v. City of Tiburon, 447 U.S. 255 (1980) 4,7

Armstrong v. United States, 364 U.S. 40 (1960) 8

Associated Home Builders v. City of Walnut Creek, 484 P.2d 606 (Cal.), appeal dismissed, 404 U.S. 878 (1971) 14

Balch Enterprises, Inc. v. New Haven Unified School District, 268 Cal. Rptr. 543 (Ct. App. 1990) 18

Banberry Development Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981) 17

Batch v. Town of Chapel Hill, 376 S.E.2d 22 (N.C. Ct. App. 1989), rev'd, 387 S.E.2d 655 (N.C. 1990), cert. denied, 110 S. Ct. 2631 (1990) 19,21

Blue Jean Equities West v. City and County of San Francisco, 4 Cal. Rptr. 2d 114 (1992) 20

Board of Supervisors of West Marlborough Township v. Fiechter, 566 A.2d 370 (Pa. Commw. Ct. 1989) 17

Cameron & Cameron, Inc. v. Planning Board of the Township of Warren, 593 A.2d 1250 (N.J. Super. Ct. App. Div. 1991) 17

Castle Properties Co. v. Ackerson, 558 N.Y.S.2d 334 (N.Y. Sup. Ct. 1990) 17

Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976) 24

Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992) 18,22

Dolan v. City of Tigard, 317 Or. 110, 854 P.2d 437 (1993) 8,11,13-15,18

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 4,26

TABLE OF AUTHORITIES
(cont'd.)

CASES: **Page**

Florida Rock Industries, Inc. v. United States, 21 Cl. Ct. 161 (1990) 8

Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970) 13

Grupe v. California Coastal Commission, 212 Cal. Rptr. 578 (Ct. App. 1985) 14

Hodel v. Irving, 481 U.S. 704 (1987) 16

J.E.D. Associates, Inc. v. Town of Atkinson, 432 A.2d 12 (N.H. 1981) 24

Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), appeal dismissed, 385 U.S. 4 (1966) 17

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470 (1987) 7

Leroy Land Development v. Tahoe Regional Planning Agency, 733 F. Supp. 1399 (D. Nev. 1990), rev'd, 939 F.2d 696 (9th Cir. 1991) 10

Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990) 8

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) 4

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986) 4

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) . . . . . passim

Park v. Watson, 716 F.2d 646 (9th Cir. 1983) 15,16

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 20

Pennell v. City of San Jose, 485 U.S. 1 (1988) 25

TABLE OF AUTHORITIES
(cont'd.)

CASES: **Page**

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) . 7,26

Pioneer Trust and Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961) 13,16,17

Plote, Inc. v. Minnesota Alden Co., 422 N.E.2d 231 (Ill. App. Ct. 1981) 13

Richardson v. City and County of Honolulu, 759 F.Supp. 1477 (D.Hawaii 1991) 17

Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960) 13

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 4

Seawall Associates v. City of New York, 542 N.E.2d 1059, 544 N.Y.S.2d 542, cert. denied, 110 S. Ct. 500 (1989) 8,18

Stanley v. Illinois, 405 U.S. 645 (1972) 25

Surfside Colony, Ltd. v. California Coastal Commission, 277 Cal. Rptr. 371 (Ct. App. 1991) 8,18

Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988) . 24

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) 8

Unlimited v. Kitsap County, 750 P.2d 651 (Wash. App. 1988) 17

William J. Jones Insurance Trust v. City of Fort Smith, Arkansas, 731 F.Supp. 912 (W.D.Ark. 1990) 17

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 4

Yee v. City of Escondido, 112 S. Ct. 1522 (1992) 4,8

TABLE OF AUTHORITIES
(cont'd.)

MISCELLANEOUS: **Page**

Babcock, Forward to Exactions: A Controversial New Source For Municipal Funds, 50 Law & Contemp. Probs. 1 (1987) 23

Bauman, The Supreme Court, Inverse Condemnation And The Fifth Amendment: Justice Brennan Confronts The Inevitable In Land Use Controls, 15 Rutgers L.J. 15 (1983) 27

Bauman & Ethier, Development Exactions and Impact Fees: A Survey Of American Practices, 50 Law & Contemp. Probs. 51 (1987) 22

Berger, L., Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases, 70 Neb. L. Rev. 186 (1991) 19

Berger, M., Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning, 20 Urb. Law. 735, 750-55 (1988) . . . 19

Best, The Supreme Court Becomes Serious About Takings Law: *Nollan* Sets New Rules for Exactions, 10 Zoning & Plan. L. Rep. 153 (1987) 19

Connors and High, The Expanding Circle of Exactions: From Dedication To Linkage, 50 Law & Contemp. Probs. 69 (1987) 21

Crew, Development Agreements After *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), 22 Urb. Law. 23 (1990) 14

Ethier & Weiss, Development Excise Taxes: An Exercise In Cleverness and Imagination, 42 Land Use L. & Zoning Dig., Feb. 1990, at 3 21

Falik & Shimko, The "Takings" Nexus -- The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California, 39 Hastings L. J. 359 (1988) . . . 19

Kelly, A Challenge To Planners: Solve the Takings Problem, 45 Land Use L. & Zoning Dig., Sept. 1993, at 3 23

TABLE OF AUTHORITIES
(cont'd.)

MISCELLANEOUS: **Page**

Daniel R. Mandelker, Land Use Law (2d ed. 1988) 19

Minda, The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Taking Problem, 62 U. Colo. L. Rev. 599 (1991) 19

Peterson, Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches, 39 Hastings L. J. 335 (1988) 19

Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L. Rev. 839 (1983) 23

Smith, From Subdivision Improvement Requirements To Community Benefit Assessments and Linkage Payments: A Brief History Of Land Development Exactions, 50 Law & Contemp. Probs. 5 (1987) 22

Sterk, *Nollan*, Henry George, And Exactions, 88 Colum. L. Rev. 1731 (1988) 21

Stroud, Legal Considerations of Development Impact Fees, 54 J. Am. Plan. A. 29 (1988) 19

Taub, Exactions, Linkages, and Regulatory Takings: The Developer's Perspective, 20 Urb. Law. 515 (1988) .. 23

Williams, Legal Discourse, Social Vision and The Supreme Court's Land Use Planning Law: The Genealogy of the *Lochnerian* Recurrence in *First English Lutheran Church* and *Nollan*, 59 U. Colo. L. Rev. 427 (1988) 19

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-518

Florence Dolan,

Petitioner,

v.

City of Tigard, Oregon,

Respondent.

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NAIOP-THE ASSOCIATION FOR COMMERCIAL REAL ESTATE, NATIONAL REALTY COMMITTEE, NATIONAL MULTI HOUSING COUNCIL, NATIONAL APARTMENT ASSOCIATION, AND AMERICAN SENIORS HOUSING ASSOCIATION IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICI CURIAE[1]

The National Association of Home Builders (NAHB) represents 165,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and

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[1] The Petitioner and Respondent have provided their written consent to file this brief and their letters of consent have been filed with the Clerk of the Court.

supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers, remodelers and manufacturers and professionals that service the building industry. NAHB is the voice of the American shelter industry.

The International Council of Shopping Centers (ICSC) is the trade association of the shopping center industry. It has approximately 24,000 members worldwide and approximately 22,000 in the United States. Its members, including developers, owners, retailers, lenders and all others having a professional interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. It represents almost all of the 37,000 shopping centers in this country and is the only U.S. trade association specific to shopping centers.

NAIOP - The Association For Commercial Real Estate is a professional organization of 5,000 individuals engaged in owning, managing and developing industrial and office buildings in the United States and internationally. Its members include not only the nation's leading commercial real estate developers but also architects, brokers, master planners, engineers, property managers, banks, insurance companies and other real estate financial groups.

The National Realty Committee represents the nation's leading developers, owners and financiers of income-producing real property. Its members include individuals and firms that design, plan, develop, lease, own, operate and finance income-producing real property, including office buildings, shopping centers, industrial buildings, warehouses and apartment buildings.

The National Multi Housing Council (NMHC) represents 500 of the larger and most respected multifamily rental housing firms. Its members are engaged in all aspects of the development

and operation of rental housing, including the ownership, building, financing, management and conversion to condominiums of such properties. The National Apartment Association (NAA) is an organization of local and state associations representing owners, builders, investors, developers and managers of multifamily properties. The NAA represents the interests of more than 200,000 multifamily housing professionals and the members of the NMHC and NAA together own and manage a substantial number of the nation's approximately 24 million rental housing units. The American Seniors Housing Association (ASHA) is affiliated with the NMHC and represents 200 of the larger and most respected seniors housing providers. Its members are involved in all aspects of the development and operation of multifamily housing for the elderly, including the ownership, building, financing and management of such properties.

The just compensation clause serves as a vital shield against oppressive governmental land use regulation. It is, therefore, of paramount importance to these amici, all non-profit trade associations, and our members. The actual, as opposed to merely theoretical, availability of an appropriate constitutional remedy for the governmental action that results in a taking is critical to the livelihood of private landowners who either 1) have lost all, or substantially all, economically beneficial use of their property in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests. The latter type of governmental imposition is presented in this case by the city's demand that an individual private property owner dedicate her land for a public bike path and greenway system along a river merely because the landowner wishes to lawfully expand her small electrical and plumbing supply business.

That a bike path and greenway system along a river are legitimate and worthwhile public desires is not the question. The question of interest to these amici is whether the land for these

public amenities must be contributed by individual private property owners, without payment therefor, who happen to own and wish to improve real estate lots that are within the government's chosen path for such facilities.

The NAHB has been before this Court either as an amicus curiae in support of or as of counsel on behalf of the property owner in prior "takings" cases involving governments' land use decisions. Yee v. City of Escondido, 112 S. Ct. 1522 (1992); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980). The NAHB and ICSC joined to file an amici curiae brief in Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). The NAHB's brief was favorably cited in this Court's Nollan opinion, 483 U.S. at 840, the opinion that is at the heart of the present controversy.

This brief is submitted to show the dire need to clarify for legislatures, land use regulatory agencies and the lower courts that in order to avoid a taking of private property, the federal Constitution requires a direct, essential and substantial nexus between public burdens created by land use proposals and government imposed permit exactions or conditions.

These amici sincerely believe that this brief will assist the Court in building on its prior decision in Nollan, 483 U.S. 825. On a daily basis our members across the nation are faced with countless regulatory decisions that affect the use of privately held land. The vast majority of these decisions come from local governments and some of these decisions do not respect the constitutionally protected property rights of individuals. While petitioner focuses her arguments on the harm the City of Tigard

inflicts on her concerns, our brief cites authorities different from those in petitioner's brief, proposes a strong rational relationship nexus and also addresses the broader public policy concerns that require a more substantial nexus test for land use regulatory agencies.

SUMMARY OF THE ARGUMENT

This Court has repeatedly stated that a governmental action violates the takings clause of the Fifth Amendment if the action does not substantially advance legitimate government interests. The leading application of this prong of takings doctrine appears in Nollan v. California Coastal Commission, 483 U.S. 825 (1987). This rule is essential to guard against governmental acts that would impose on individuals costs that properly belong with the public as a whole even if the individual has not been denied all, or substantially all, economically viable use of its property.

The City of Tigard's land dedication exaction does not substantially advance, in the constitutional sense, its legitimate government interest in a public bike path and greenway system along a river. The city justifies its land exaction through a purported but unsupported nexus between an otherwise lawful land use proposal and the city's professed need for a bike path and greenway system. The city's justification is based on mere assumptions and findings of general facts as to the burdens created by the proposed use of land and, more to the point, how the development exactions are connected to or would alleviate those burdens. While clever and imaginative, the justification is far too tenuous to pass constitutional scrutiny. If it is allowed to stand, governments at all levels will feel ever more free to contrive any nexus, no matter how flimsy, between an individual's proposed use of his or her land and the furtherance of a legitimate public purpose. Nollan's requirement for a direct, essential nexus, Id., 483 U.S. at 837, will vanish.

Additionally, while the decision below follows a few similar interpretations of both the extent of Nollan's required nexus and the level of judicial scrutiny to be applied in reviewing such nexus, it is directly contrary to most other courts and the greater weight of published authority. These latter authorities interpret Nollan as requiring a nexus greater than a mere minimal rational relationship and heightened judicial scrutiny of government's claimed nexus. This Court must reapply and clarify its mandate in Nollan and restate to legislatures, land use regulatory agencies and lower courts that there must be a direct and substantial nexus between the public burdens created by a land use proposal, if any, and the approval conditions imposed on the individual property owner. But, given the wide interpretation of the adjective "substantial," the Court is urged to define the required nexus in terms understood in the context of land use exaction jurisprudence, such as "proportionality" and "specifically attributable" to public burdens created.

There is something nefarious in the city's position that a merely professed nexus is sufficient to deprive individuals of their private property with no compensation merely because the private owner wants to use her land in an otherwise lawful way. Something more substantial is required by the Constitution's just compensation clause. Planning for and acquiring the necessary land and capital to build adequate public facilities to support our cities and towns, such as alternative bike and pedestrian pathways and river greenways, are important governmental functions in maintaining society's quality of life. But propositions that further those ends must respect the property rights of individuals. Anything short of that proper respect, as has occurred here, is repugnant to the higher considerations expressed in the Constitution and cannot stand. The constitutional rights at issue in this case, which were not upheld below, must be reconfirmed by this Court. Those suffering under the deplorable state of affairs of the land use regulatory system across the country are desperate, if not greatly anxious, for further United States Supreme Court supervision of their constitutional rights.

These amici respectfully request the Court to reverse the decision below and restate the nexus appropriately required by the Constitution's takings clause in these situations. Further, we urge the Court to restate that courts should employ a heightened level of scrutiny to the nexus claims of government's land use regulators. It is our fervent hope that the Court will send anew the message to all governments that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

ARGUMENT

I. THIS COURT SHOULD NOT ALLOW THE SUBSTANTIAL ADVANCEMENT PRONG OF THE FIFTH AMENDMENT'S TAKINGS CLAUSE, WHICH OSTENSIBLY PROHIBITS THE TYPE OF PERMIT CONDITION EXACTED IN THIS CASE, TO BECOME USELESS TO PROPERTY OWNERS AS A LIMITATION ON GOVERNMENT POWER

This Court has reiterated that a regulatory taking occurs if a government regulation either denies a property owner economically beneficial use of the property or does not substantially advance a legitimate government interest. Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987); Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 485 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). The importance of maintaining the distinction between these two prongs of takings doctrine is self-evident. There are occasions where a government's actions substantially advance legitimate government interests but nonetheless deny a particular landowner all, or substantially all, economically beneficial use of

the private property.[2] Likewise, there are situations, such as in this case, where a government's actions do not deny a landowner economically beneficial use of the property but nonetheless do not substantially advance a legitimate government interest. Nollan, 483 U.S. 825; Surfside Colony, Ltd. v. California Coastal Commission, 277 Cal. Rptr. 371 (Ct. App. 1991); see also Yee v. City of Escondido, 112 S. Ct. 1522, 1532 (1992) (Petitioners allegation that an ordinance "does not 'substantially advance' a 'legitimate state interest' . . . does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property . . . ."). These two tests are an important part of this Court's effort to protect individuals in situations where it would be unfair to impose costs on an individual that properly belong with the public. See Armstrong v. United States, 364 U.S. 40, 49 (1960); Seawall Associates v. City of New York, 542 N.E.2d 1059, 1065 (1989), cert. denied, 110 S. Ct. 500 (1989).

The substantial advancement takings test, as applied to land use permit exactions, requires that there be an "essential nexus" between a permit condition and the burden placed on the community by the proposed land use. See Nollan, 483 U.S. at 837. Further, the government's support for this essential nexus, when challenged, must be reviewed by a court with heightened scrutiny. Id., 483 U.S. at 834 n.3. The issue presented, which "involves questions of federal law," Dolan v. City of Tigard, 317 Or. 110, 122, 854 P.2d 437, 444 (1993) (Peterson, J., dissenting), is whether the city's demand that the property owner dedicate

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[2] See, e.g., Florida Rock Industries, Inc. v. United States, 21 Cl. Ct. 161 (1990); Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153 (1990); Cf. United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985) (While upholding the Clean Water Act's grant of jurisdiction to regulate certain wetlands, the Court noted that a property owner can still bring a takings claim in U.S. Claims Court if a dredge or fill permit is applied for and denied and the "effect of the denial is to prevent 'economically viable' use of the land in question").

land for a bike path and greenway along a river bordering her property substantially advances, in the constitutional sense, the city's legitimate interest in providing such public facilities. That is, the question involves whether there is an essential nexus between the burdens on the city that are caused by Dolan and Dolan's permit condition.

It is not constitutionally sufficient for a government to profess or even prove merely that there is an impact from the proposed land use and that the permit condition furthers, in a literal sense, a legitimate government interest. If that were so, the government would always win. For example, if a municipality has a legitimate interest in maintaining an efficient highway and street system (and one would presume it does) and if a proposed land use admittedly would generate one additional car per week visiting the owner's site, would an approval condition that requires the single land use applicant to dedicate and construct a four-lane highway with an interchange at the rear of the lot be justified under the Constitution? We think not despite the fact that, in this hypothetical, there is an admitted impact and the new highway and interchange clearly furthers the municipal interest in having an efficient traffic system. The important point in both this hypothetical and in this case is that 1) whatever impacts to the public from a proposed land use are admitted or proved and 2) whatever connection a development exaction has to the furtherance of a legitimate government interest, 3) there must, in addition, be sufficient facts in the record that support a direct relationship between the public impacts caused by the proposed land use and the specific exaction involved.

While the land use impact itself and the connection between the permit condition and the government's desires for public facilities are constitutionally important elements of a sound land use regulatory analysis, most often the critical factor for landowners is the relationship (i.e., the essential nexus) between the public burdens they create and the conditions or exactions ostensibly designed to alleviate such burdens. Accord, e.g.,

Leroy Land Development v. Tahoe Regional Planning Agency, 733 F. Supp. 1399, 1401 (D. Nev. 1990) (Nollan's "fairly close nexus . . . should be considered in conjunction with the property in question."), rev'd, 939 F.2d 696 (9th Cir. 1991). Anything less than a close relationship between public impacts created by an individual and government imposed exactions runs the risk of having that individual bear costs the need for which she did not create and that properly belong with the public, or at least other individuals. Imposing more than one's fair share of public facility costs on an individual would not be very fair.

Moreover, while the legitimacy of a government interest is best left to the discretion of the political branches of government, the means to achieving such ends is properly the subject of judicial review. Thus, upon review by the courts, the analyses of the alleged land use impacts and the relationship between such public burdens and the exactions imposed on an individual will be meaningless to property owners unless a municipality is made accountable for them. This cannot be accomplished with a deferential standard of review traditionally applied in a due process context. In examining the Court's "essential nexus," Nollan, 483 U.S. at 837, the Court has stated that

> our opinions do not establish that these standards are the same as those applied to due process or equal-protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, . . . not that the "State 'could rationally have decided' the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 835 n.3 (citations omitted; emphasis in original). Thus, while the traditional deferential standard of judicial review is applicable to the question of whether

government's desired end is legitimate, the means of achieving that end, which involves questions of the alleged impact of a land use proposal and the relationship between such impacts and the property exacted from an individual, requires something more. While perhaps the strictest form of scrutiny is not warranted at this stage in the evolution of American land use jurisprudence, heightened or mid-level scrutiny is made more than necessary by the state of land use regulatory practices today.

Nollan, 483 U.S. 825, apparently, was not enough for some governments and lower courts to adequately answer the nexus question before the Court in a way that does justice to the Constitution and those wishing to live under its protection. The question presented involves an essential constitutional limitation on the burgeoning growth of land use regulations. A restatement of the law surrounding the question is now absolutely critical to the livelihood of the members of these amici as well as the pursuit of happiness by all property owners and those desiring to own property.

Here, the petitioner wishes to use her property in a way that but for the challenged permit conditions lawfully expands the current business on the site. She is penalized for this wish by the forced dedication of her land to the public. This exaction is based solely on professed and, at best, weak assumptions made by the city's regulators as to the connection between the burdens created by the expanded use and the exaction that is supposed to resolve those burdens. This cannot be the concept of fairness and justice embodied in the Fifth Amendment. Yet the Oregon Supreme Court lets the land dedication requirement stand without just compensation under the court's minimal nexus standard. Dolan, 317 Or. 110, 854 P.2d 437. We find the Oregon Supreme Court's weak nexus test and deferential rational relationship standard of review dangerous and insupportable in today's heavily regulated, yet still constitutional, society. If the court below is correct, then this Court's 1987 Nollan decision, after only a few years, has collapsed under the weight of a few lower court interpretations, and the "substantial advancement of

legitimate government interests" takings prong has become meaningless to property owners.

We do not propose that private property rights always rise to a constitutional level that thwarts all, or even most, legitimate public purpose regulations. Our society could not function if that were so, particularly since the legitimacy of regulations is given such great latitude and we live in an increasingly populated and closer world. But mere assumptions by government regulators, as here, or even findings of fact that are less than substantial are not sufficient to survive constitutional scrutiny if private property rights are to have any meaning in our constitutional culture. If the constitutional guarantee at issue here has any substance to it at all, surely the city must find substantial and concrete facts that prove on the record that there is an "essential nexus" before the city is allowed to take a portion of private property without compensation merely because the property owner wishes to conduct an otherwise lawful and proper use on it.

II. THE "ESSENTIAL NEXUS" REQUIREMENT OF NOLLAN v. CALIFORNIA COASTAL COMMISSION, 483 U.S. 825 (1987), PROHIBITS THE CITY FROM IMPOSING ITS LAND DEDICATION DESIRES ON DOLAN, AND REQUIRES REVIEW WITH HEIGHTENED JUDICIAL SCRUTINY

This case is very much like the Nollan case, where the Court admonished the government for its attempt to compel a property owner to contribute to the realization of an easement, even though the government "may well be right that [the easement] is a good idea." Id., 483 U.S. at 841. The Court stated in Nollan, 483 U.S. at 842, that if the government "wants an easement across the Nollans' property, it must pay for it." Similarly here, Tigard may well be right that providing a public

bike and pedestrian path and a river greenway system is a good idea. But, if the city wants to provide such facilities, it must pay for it.

These amici believe this Court's opinions stating that a government's actions must "substantially advance a legitimate government interest" mandates, in the takings context, a direct connection between the government action and the burdens imposed on the community by a new use of private land. However, the Oregon Supreme Court says that it "does not read Nollan" as "abandon[ing] the 'reasonably related' test for a more stringent 'essential nexus' test." Dolan, 317 Or. at 120, 854 P.2d at 443. We recognize that the takings clause may not require that land use exactions and fees be precisely tailored to the burdens and benefits attributable to the property being assessed. See, for example, the specifically and uniquely attributable test employed by some courts to evaluate impact fees. Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960); Pioneer Trust and Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970). That level of nexus is the strictest form of required nexus yet devised by the courts.[3] However, the decision below essentially incorporates into its takings analysis the extremely lax, anything goes, nexus test (i.e., reasonable basis) historically used

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[3] Cf. Plote, Inc. v. Minnesota Alden Co., 422 N.E.2d 231, 235-36 (Ill. App. Ct. 1981) ("[T]he Illinois Supreme Court is currently tending toward a more liberal interpretation of the validity of exaction ordinances while maintaining the requirements of proportionality and specific attributability.").

by the California state courts.[4] This is the other extreme and should not be permitted.

In looking at land use exactions, the label "rational relationship test" is typically referred to as a mid-level or intermediate analysis of the required nexus, an approach lying somewhere between a reasonable basis and one that is specifically and uniquely attributable to impacts caused and benefits received by the land owner. Crew, Development Agreements After *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), 22 Urb. Law. 23, 26-27 (1990). However, it must be recognized that the so-called "intermediate" rational relationship test has multiple degrees of sophistication. Without more explicit criteria defining its requirements, merely stating that a nexus must meet the "rational relationship" label is confusing at best and dangerous at worst, as the result from the lower court's analysis points out. The Nollan "substantial advancement" standard must require something between the more deferential types of "rational relationship" standard and the strict "specific and unique" relationship standard historically utilized by a few state courts. Again, anything less than a close fit between public burdens created and private property exacted would simply not be fair, and should not be condoned by our Constitution.

In rationalizing its view of the required nexus, the Oregon Supreme Court tells us with circular logic that this Court's "essential nexus" means that an essential nexus is one that is reasonably related to an impact. Dolan, 317 Or. at 120, 854 P.2d at 443. The court below also states that this essential nexus can be found when the "exaction serves the same purpose

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[4] See Associated Home Builders v. City of Walnut Creek, 484 P.2d 606, 611-13 (Cal.), appeal dismissed, 404 U.S. 878 (1971)); See also Grupe v. California Coastal Commission, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985) (upholding a permit condition requiring the dedication of an easement over two-thirds of a parcel that is based on only an indirect nexus, with no benefit to the proposed single-family home).

that a denial of the permit would serve." Id. But, as in Nollan, the permit condition here cannot serve the same purpose that a development ban would achieve. The City of Tigard's purpose of acquiring a continuous and efficient bike path and greenway would not be realized by denying Dolan's land use proposal. How then would such continuous and efficient public facilities materialize? They do not exist now, and the only way the city can obtain its bike path and greenway without paying for them is to condition any land use proposal that happens to occur on the land upon which the bike path and greenway are planned. See Dolan, 317 Or. at 123-24, 854 P.2d at 445-46 (Peterson, J., dissenting). The majority below does recognize that "[r]equiring an uncompensated conveyance of the easement outright would violate the Fourteenth Amendment," Dolan, 317 Or. at 118, 854 P.2d at 442, but that provides land owners little comfort when even the smallest and least intrusive land use proposals require governmental approvals and permits.

In support of its view that Nollan did not provide for a nexus that is based on more than just a mere minimal rational basis in these permit exaction cases, the Oregon Supreme Court cites to Park v. Watson, 716 F.2d 646, 653 (9th Cir. 1983). Dolan, 317 Or. at 118, 854 P.2d at 442. The court cites to Park v. Watson because this Court cited to Park v. Watson in Nollan, 483 U.S. at 839-40, as the first case in a long string citation of cases. The Court's string citation supported the Court's view that its holding (i.e., that the easement exacted from the Nollans was not connected to any of the California Coastal Commission's professed purposes) was "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." Nollan, 483 U.S. at 839. But Park v. Watson and this Court's citation of it in Nollan does not stand for the proposition that Nollan requires only a minimal rational nexus. This Court's citation of Park v. Watson comes, of course, after the Court noted that "[w]e can accept, for purposes of discussion, the Commission's proposed test as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most

untailored standards." Nollan, 483 U.S. at 838. Thus, of course the holding in Nollan would be consistent with even those cases, such as Park v. Watson, employing a minimal rational relationship nexus test and a deferential standard of review to find the nexus involved there insufficient to support the permit condition.

Even more telling, the Oregon Supreme Court fails to note that the string citation in Nollan, 483 U.S. at 839-40, that begins with Park v. Watson, 716 F.2d 646, also contains citations to cases requiring a much greater nexus than one supported by a rational relationship. See e.g., Pioneer Trust & Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961). Moreover, the Oregon Supreme Court's reliance on Park v. Watson, 716 F.2d 646, is misplaced because while the Oregon court upheld the permit conditions imposed on Dolan, the Ninth Circuit held in Park v. Watson that the condition in question violated the just compensation clause.

We propose that when the government requires a property owner to dedicate land there must be a direct, substantial and essential connection to the relevant burdens imposed on the community by the owner's particular proposed land use. But even these adjectives leave too much to the great interpretive powers of government legislators and administrative officials who generally respond to the majority's wishes. This direct connection, therefore, should incorporate the essential elements of proportionality and specific (although perhaps not unique) attributability, and this nexus must be supported by at least substantial evidence on the record. Otherwise, the government exaction must be accompanied by just compensation. And if the government intends to provide no compensation, then the condition not meeting the constitutionally required nexus must be invalidated. See Hodel v. Irving, 481 U.S. 704 (1987).

The concept of proportionality was implicitly stated by this Court in Nollan, 483 U.S. at 835 n.4, but, for at least some land use regulators, implicit expressions of the limitations by

which they must govern are, apparently, not enough. Many other courts, pre and post Nollan, have incorporated notions of proportionality into their particular forms of rational relationship analysis. See e.g., Richardson v. City and County of Honolulu, 759 F.Supp. 1477, 1494-96 (D.Hawaii 1991); William J. Jones Insurance Trust v. City of Fort Smith, Arkansas, 731 F.Supp. 912 (W.D.Ark. 1990); Cameron & Cameron, Inc. v. Planning Board of the Township of Warren, 593 A.2d 1250, 1254 (N.J. Super. Ct. App. Div. 1991); Castle Properties Co. v. Ackerson, 558 N.Y.S.2d 334, 336 (N.Y. Sup. Ct. 1990); Board of Supervisors of West Marlborough Township v. Fiechter, 566 A.2d 370, 373 (Pa. Commw. Ct. 1989); Banberry Development Corp. v. South Jordan City, 631 P.2d 899, 903-904 (Utah 1981); Unlimited v. Kitsap County, 750 P.2d 651, 653 (Wash. App. 1988); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 447-48 (Wis. 1965) (the first case to apply a rational relationship nexus test, specifically taking a step away from the strict "specific and unique" relationship test of Pioneer Trust & Savings Bank, 176 N.E.2d 799), appeal dismissed, 385 U.S. 4 (1966).

Thus, a rational relationship nexus that is grounded firmly on concepts of proportionality would require a government to determine a private landowner's pro rata (i.e., fair) share of the costs of public burdens based on that landowner's contribution in creating such public burdens. Given the serious damage that land use regulators have caused and can continue to cause to the constitutional rights of property owners, this is a minimal burden and, in fact, is already borne by many government agencies that respect and understand the importance of the rights of property owners. The Oregon Supreme Court's deferential review, allowing a completely untailored nexus to withstand constitutional scrutiny, is too important a federal issue to go uncorrected by this Court. This Court must make federal constitutional law fair and uniformly applicable to all citizens and reverse the decision below.

In reviewing the required nexus and to help justify its view that Nollan did not change the standard of inquiry in a "substantial advancement" takings case, the court below states that it is "not alone in interpreting Nollan in this manner." Dolan, 317 Or. at 119, 854 P.2d at 443 (citing to Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992). The Ninth Circuit stated that it is "not persuaded that Nollan materially changes the level of scrutiny" that must be applied to the ordinance at issue. Commercial Builders, 941 F.2d at 874. The Ninth Circuit also asserted that "Nollan holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld." Commercial Builders, 914 F.2d at 875 (emphasis added). In other words, according to the Ninth Circuit's reading of Nollan, only a scintilla of evidence is necessary to support a constitutional nexus. While we find the Ninth Circuit's reading of Nollan insupportable, the Oregon Supreme Court's reliance on it is even more remarkable because here there was not even a scintilla of evidence to support the city's generalized findings and assumptions about the impacts on the public caused by Dolan's proposed expansion of her business and the connection between public impacts and the permit conditions. Accord Balch Enterprises, Inc. v. New Haven Unified School District, 268 Cal. Rptr. 543 (Ct. App. 1990) (while following the extremely deferential standard of review used by the California courts, a school impact fee on commercial development was overturned because the school district did not provide any evidence to show that commercial development created the need for additional schools).

The Oregon Supreme Court decision is completely inapposite to other courts that have considered the meaning of Nollan. See, for example, Seawall Associates v. City of New York, 542 N.E.2d 1059, 1068 (N.Y. 1989), cert. denied, 110 S. Ct. 500 (1989), in which the New York Court of Appeals stated that Nollan requires semi-strict or heightened scrutiny. Likewise, in Surfside Colony, Ltd. v. California Coastal Commission, 277

Cal. Rptr. 371, 377 (Ct. App. 1991) (footnotes omitted), the court held that "Nollan, however, changed the standard of constitutional review in takings cases. Whether the new standard be described as 'substantial relationship,' or 'heightened scrutiny,' it is clear the rational basis test . . . no longer controls." See also Batch v. Town of Chapel Hill, 376 S.E.2d 22, 29, 34 (N.C. Ct. App. 1989) (Nollan established heightened judicial scrutiny and the nexus test of development exactions must contain the element of proportionality.), rev'd on other grounds, 387 S.E.2d 655 (N.C. 1990), cert. denied, 110 S. Ct. 2631 (1990).

Leading authors are in line with the view that Nollan changed the standard of review to heightened scrutiny, higher than the rational relationship review employed by the Oregon Supreme Court below. Berger, M., Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning, 20 Urb. Law. 735, 750-55 (1988); Best, The Supreme Court Becomes Serious About Takings Law: *Nollan* Sets New Rules for Exactions, 10 Zoning & Plan. L. Rep. 153, 156 (1987); Falik & Shimko, The "Takings" Nexus -- The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California, 39 Hastings L.J. 359, 380-81 (1988); Minda, The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Taking Problem, 62 U. Colo. L. Rev. 599, 613-14 (1991); Peterson, Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches, 39 Hastings L. J. 335, 338 (1988); See also, Berger, L., Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases, 70 Neb. L. Rev. 186, 210 (1991) ("It was Justice Scalia's use of the language of intermediate heightened scrutiny, in connection with a takings analysis . . ., that marks the importance of the Nollan case."); Daniel R. Mandelker, Land Use Law § 2.23 at 45 (2d ed. 1988) ("Nollan's most important holding is the heightened standard of judicial review it adopted."); Stroud, Legal Considerations of Development Impact Fees, 54 J. Am. Plan. A. 29 (1988) (Nollan "will require a strict accounting from local governments of how they use land development exactions"); Williams, Legal Discourse, Social Vision and The Supreme

Court's Land Use Planning Law: The Genealogy of the *Lochnerian* Recurrence in *First English Lutheran Church* and *Nollan*, 59 U. Colo. L. Rev. 427, 465 (1988) ("Nollan's significance is that for the first time in nearly sixty years, a Supreme Court land use decision has trumpeted property as a fundamental right, entitled to a heightened standard of judicial review under the Constitution.").

Thus, the opinion of the Oregon Supreme Court below is blatantly against the greater weight of authority. Not only has Florence Dolan been unjustifiably harmed by government's land use controls but the intolerable morass of governments and lower courts warping what the Court said in Nollan wastes precious resources by both land use proponents and their government regulators nationwide. Clear guidance, using terms familiar to land use exaction jurisprudence, such as proportionality and specific attributability, as well as heightened scrutiny for judicial review of the required nexus, are necessary to resolve these issues and the questions presented.

Finally, this Court warned that it would be particularly careful about the adjective "substantial" in the substantial advancement takings test where "the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." Nollan, 483 U.S. at 841. "It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed." Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting). Yet, while the Court would be particularly careful where the conveyance of property is involved, such language gives carte blanche to government regulators to impose, as permit conditions, all sorts of fees or other non-physical "exactions." Other courts also have interpreted Nollan so as to dwindle away the important constitutional limitation on government power at issue here. See, e.g., Blue Jean Equities West v. City and County of San Francisco, 3 Cal. App. 4th 164,

165, 4 Cal. Rptr. 2d 114, 115 (1992) (Nollan's heightened scrutiny requirement applies to only possessory takings and not to regulatory takings), cert. denied, 113 S. Ct. 191 (1992). It is vitally important that the direct, essential nexus standard apply to all "exactions," including those that do not take the form of physical intrusions. Cf. Sterk, *Nollan*, Henry George, And Exactions, 88 Colum. L. Rev. 1731 n.3 (1988) ("[I]t requires but a small step to apply the Nollan strict scrutiny test when a municipality insists on payment of money for permission to develop rather than on dedication of some right to occupy land."). See also Batch, 376 S.E.2d at 30 (development exactions fall into one of four categories: 1) land dedication, 2) construction of improvements on such land, 3) fees paid in lieu of dedication, and 4) impact fees), rev'd on other grounds, 387 S.E.2d 655. In government's insatiable quest to find alternative sources of revenue, additional forms of "exactions" have also arisen, including "linkage fees" and "development excise taxes." See Connors and High, The Expanding Circle of Exactions: From Dedication To Linkage, 50 Law & Contemp. Probs. 69 (1987); Ethier & Weiss, Development Excise Taxes: An Exercise In Cleverness and Imagination, 42 Land Use L. & Zoning Dig., Feb. 1990, at 3.

Government's "impact fees" and other exactions that are outside the realm of land dedications, and which are used to fund all manner of public facilities, can be just as devastating to private property owners as physical land exactions. In all cases where the government imposes any type of exaction there is a heightened risk that the purpose of the exaction is avoidance of the bill to pay for the public amenities rather than the stated police-power objective. Cf. Nollan, 483 U.S. at 841. Thus, takings of private property, whether of land, currency or any other type, should be bound by the substantial nexus requirements outlined by this Court.

III. THE CITY'S ACTIONS IN THIS CASE DEMONSTRATE A LOCAL LAND USE PRACTICE THAT CLAMORS FOR THIS COURT TO ADMONISH GOVERNMENTS THAT DISREGARD AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS

It has been a long-standing governmental practice to demand land (e.g., land dedications) or money (e.g., impact fees and fees in lieu of dedications) from property owners who propose to build on their land. See, for example, Bauman & Ethier, Development Exactions and Impact Fees: A Survey Of American Practices, 50 Law & Contemp. Probs. 51 (1987), and authorities cited therein. But

> [t]he reach of subdivision exactions has significantly expanded over the years. What began as a means for preventing a subdivision from shifting to the municipality the responsibility for installing public improvements has been transmuted into a device by which municipalities are shifting to private land developers the cost of facilities and social programs for the general public that local governments can no longer afford.

Smith, From Subdivision Improvement Requirements To Community Benefit Assessments and Linkage Payments: A Brief History Of Land Development Exactions, 50 Law & Contemp. Probs. 5, 28 (1987). "[S]tate and local governments have begun to stretch the use of exactions to the breaking point." Commercial Builders of Northern California, 941 F. 2d at 877 (Beezer, J., dissenting). In a national symposium on development exactions, Professor Babcock, the late dean of the American land use bar, cited examples of abusive exactions and followed with this discussion:

> In each of these cases one can imagine the initial reaction of the "extractee" - outrage. In each case he surely went to his attorney and asked two questions: (1) How long will it take to get a final answer in court if we challenge this condition?; and (2) How much will it cost?
>
> The answers probably were: (1) It will take three to four years, with the possibility of defeat; and (2) It will cost tens if not hundreds of thousands of dollars.
>
> By the time the developer approaches his attorney, he has invested a large sum of front-end money and has a great deal of interest in obtaining a permit. Moreover, he wants the permit immediately. He takes out his pencil, does some calculating, and decides to pay up. This example is a classic illustration of what I call "municipal leverage."

Babcock, Foreword to Exactions: A Controversial New Source For Municipal Funds, 50 Law & Contemp. Probs. 1, 2 (1987). See also Kelly, A Challenge To Planners: Solve the Takings Problem, 45 Land Use L. & Zoning Dig., Sept. 1993, at 3 ("[R]egulations are often adopted with surprisingly little planning and often with inadequate consideration of the impacts on private interests . . . ."); Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L. Rev. 839, 841 (1983) ("[L]ocal governments cannot be trusted to deal fairly or carefully even in land decisions with only local consequences."); Taub, Exactions, Linkages, and Regulatory Takings: The Developer's Perspective, 20 Urb. Law. 515, 518 (1988) ("The fact that developers are willing to pay suggests the power of the local government's position, not the reasonableness of the exaction."). Consequently, many of the demands and exactions imposed on individuals by local governments go unchallenged.

Local governments are well aware of the amount of time, money and other resources that are invested in a land use proposal even before the first application for approval is submitted. Local governments are usually free to exercise their municipal leverage to extract all types of property interests and money from project applicants. And when challenged, only occasionally will courts scrutinize the exercise of this municipal leverage in ringing terms. See e.g., Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) (Land dedication "far out of proportion to the needs created by his subdivision . . . [amounts to] . . . grand theft."); J.E.D. Associates, Inc. v. Town of Atkinson, 432 A.2d 12, 14 (N.H. 1981) (Land dedication and fee in lieu of dedication "appears to us to be an out-and-out plan of extortion."), overruled on other grounds, Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988); see also Nollan, 483 U.S. at 837 (easement condition amounts to extortion). As difficult as a takings challenge, indeed any litigation, is for the property owner, the just compensation clause should remain a fundamental crutch to support the property owner in fighting the heavy-handed leverage brought to the table by the municipality. The Oregon Supreme Court's opinion below fatally damages this constitutional crutch.

These amici do not mean to suggest that all local governments -- counties, cities and towns -- are ruthless and unreasonable in conducting their daily land use decision making processes. Many, if not most, local governments are reasonable and sincere in their efforts to promote the public's health, safety and welfare. But while it is our view that too many communities do not respect constitutional considerations for the sake of political or financial expediency, if only one community forsakes one of its citizen's rights, the constitutional damage is done and we are all worse off because of it. And that damage is exponentially magnified by judicial acceptance of it. It is exactly because of these situations that constitutional doctrine must be developed to protect individual rights, including property rights. The courts must step in to correct the constitutional damage and restore fairness and justice to land use regulatory systems.

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972). We thought we obtained some relief with Nollan's dictates but decisions like those below point out, again, that important individual freedoms that run counter to the majority's wishes are the most evanescent of all. The types of unconstitutional permit conditions involved in this case cannot continue to crush forward. The role of the courts is to define when the government has gone too far and insure that adequate remedies exist to redress the individual's loss. The Oregon Supreme Court failed to exercise its duty of supervision in the conflict between the public's interest and the private property owner's rights.

While the takings clause in general does not act to prohibit transfers of wealth deemed appropriate by the majoritarian branches of government, courts ought to be suspicious of governmental actions that affect a narrow class of individuals as such actions can be taken without the usual political constraints. Justice Scalia recognized this danger in Pennell v. City of San Jose, 485 U.S. 1, 21-23 (1988) (Scalia, J., dissenting). Thus, when wealth is exacted from a narrow class of individuals, as here, the takings clause should wield its power to limit governmental actions.

The Court has noted that

> many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just

> Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S., at 416.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321- 22 (1987). The context of the present case is a perfect vehicle within which the Court may elaborate on and reaffirm these just compensation clause principles, and the Court may do so without fear of unduly burdening land use regulatory agencies. The prohibition on constitutional shortcuts cannot be circumvented by regulators or the judiciary merely because the prohibition places the demanding task of responsible and accountable land use planning on the backs of government's land use agencies. After all, local governments are constrained by the just compensation requirement only to the extent that it means the land use business is to be conducted fairly, carefully, and with proper constitutional respect.

> Reasonable land use controls that are careful to take into account community responsibilities and individual rights are necessary for the wise growth of our vibrantly complex society . . . . Just as any successful business or institution must plan for the future, so, too, must government. Land use plans and zoning provisions that are fairly adopted, substantively sensible, consistently reliable and, when necessary, amendable, pose a major threat to none but those few on society's fringes who are greedy for unjust power or riches.
>
> . . . .

> While it has long been recognized that mere planning, without more, cannot be a taking . . . concrete zoning or subdivision decisions that may or may not implement the plan are more than capable of becoming takings.
>
> . . . .
>
> The problem with the municipal prerogative is not its existence but the temptation to make it, at times, an overbearing presence. Government must exercise authority, but tempered by meaningful accountability, both social and legal.

Bauman, The Supreme Court, Inverse Condemnation And The Fifth Amendment: Justice Brennan Confronts The Inevitable In Land Use Controls, 15 Rutgers L.J. 15, 85 - 86 (1983). These amici curiae ask this Court only that the City of Tigard be held meaningfully accountable, as constitutionally required, for its actions against Dolan.

CONCLUSION

For the reasons stated above and in the Brief of Petitioner, this Court is urged to reverse the Oregon Supreme Court and hold that the Constitution in land use exaction cases requires a strong nexus, one that is firmly grounded in the fair concept of proportionality, between the public burdens created by an individual and the permit conditions imposed on her. The Court is also urged to restate that heightened judicial scrutiny is to be applied to property owner challenges to government exactions of private property.

Respectfully Submitted,

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In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Oregon

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF REALTORS® AND THE OREGON ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER FLORENCE DOLAN

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Pursuant to Supreme Court Rule 37, the National Association of Realtors®* and the Oregon Association of Realtors® respectfully file this amicus curiae brief in support of petitioner, Florence Dolan and urge this Court to reverse the decision of the Oregon Supreme Court. Counsel for petitioner and respondent have consented to the filing of this brief and such consent has been lodged with the Clerk of this Court.

IDENTITY AND INTEREST OF AMICUS CURIAE

The National Association of Realtors® (hereinafter NAR) is a not-for-profit professional association comprised of approximately 726,000 persons engaged in all phases of the real estate business. NAR was created in 1908 to promote and encourage the highest and best use of land, to protect and promote private ownership of real property and to advance professional competence in the rendition of real estate services.

NAR includes among its members real estate brokers, managers, appraisers, counselors, and a variety of other participants in the residential, commercial, industrial, farm and investment real estate markets. Through its many programs and the programs of its affiliated Institutes, Societies and Councils, NAR has been involved in matters of concern to property owners for over three

*The term "Realtor®" is a federally registered collective membership mark used to identify numbers of NAR who subscribe to NAR's strict code of ethics.

quarters of this century. Of the issues which have concerned NAR, few, if any, have been more fundamental or of greater importance than the preservation of private property rights as established by the United States Constitution. This commitment to private property rights is the cornerstone of NAR, for without such rights there would be no ownership, development, transfer, or enjoyment of real estate.

At stake in this case is the vitality of the protection afforded property owners by the Fifth and Fourteenth Amendments of the United States Constitution against the uncompensated taking of property by the imposition of regulations which fail to substantially advance a legitimate government interest. The decision below, unless remedied by this Court, will substantially, if not entirely, undermine the viability of the protection provided by those Constitutional provisions and this Court's precedents interpreting them.

NAR is well-positioned to recognize the gravity of this threat. NAR's members, who are involved in more than 80% of all real property resale transactions, span the nation. The comprehensive involvement of NAR and its members in land development, investment, and sale provides NAR with a clear understanding of the impact regulatory actions such as the one at issue here have on the enjoyment and exercise of constitutionally protected property rights.

Similarly, the Oregon Association of Realtors®, a state-level affiliate of NAR (hereinafter OAR) is a nonprofit, professional association of commercial and residential real estate professionals in the state of Oregon

with approximately 12,000 members. OAR and its members have been involved in litigation at various times in support of individuals' rights in property and are deeply concerned about the extent to which government may legally restrict the use of land. Real property is the substance of its members' business and "[t]he substantial value of property lies in its use." *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 409, 348 P.2d 664, 669 (1960). Conditions imposed on use, therefore, influence the marketability of land.

Members of OAR advise the public on the attributes of land affecting its value. The Oregon Supreme Court's decision in this case allows government to attach conditions to otherwise permitted uses of property based on speculative impacts the government might imagine could result from proposed uses of property. The value of property depends on a number of interdependent factors, among the most significant of which is the extent to which government can impose conditions, especially exactions, on uses. If conditions can be imposed on the basis of conjecture and without proof as allowed by the Oregon Supreme Court, property values will become more unstable than what naturally occurs in the market and will leave people with greater uncertainty and risk. The OAR's concern and experience with these issues will amplify the argument presented by the Petitioner in this case.

The purpose of OAR and NAR in submitting this brief amicus curiae is to add the voices of the hundreds of thousands of NAR and OAR members and the millions of American property owners they serve to the chorus of

others concerned with the dangerously limiting construction of the Fifth Amendment's guarantee of private property rights articulated by the court below.

SUMMARY OF ARGUMENT

The Constitution's protection of property in the Fifth Amendment is far more than an inconvenience to government regulators. Its purpose is to make sure that individuals are not saddled with more than their fair share of the burdens of government. If an individual is singled out to contribute more than what is demanded through the taxing power, it is the government's obligation to prove that it is taking no more than is necessary to protect the public from burdens caused by that individual.

What is demanded must alleviate real burdens – not ones which are merely hypothetical, conjectural, speculative or imagined. And if the public burden to be alleviated is caused by many parties, each individual burden must be proportional to the burden caused by each individual. Causation of public harm and the cost of redress are natural parameters for land use exactions.

Finally, the courts must ensure that government proves a real, rather than a theoretical connection between the use and the condition. Such proof requires evidence and a nonprejudicial trier of fact. Otherwise, the strong public desire to make the few pay for the benefits to the many will become the order of the day.

ARGUMENT

I

CONDITIONS IMPOSED ON PERMISSION TO USE PRIVATELY OWNED LAND CAN TAKE FROM THE OWNER ONLY THAT WHICH MITIGATES ACTUAL BURDENS TO THE PUBLIC CAUSED BY THE PROPOSED USE

The central question of this case concerns what limits the Constitution places on conditions attached to permits to use privately owned property. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court reviewed a permit to replace an existing beach front dwelling with a larger home on the condition that the owners dedicate an easement for public access along their privately owned beach. This Court concluded that such a condition violated the Takings Clause of ~~the~~ Fifth and Fourteenth Amendments because the condition failed to substantially advance a legitimate government interest. *Nollan*, 483 U.S. at 835 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). Recognizing that requiring the easement outright would have constituted a taking of property, the Court in *Nollan* considered whether a taking occurred when such a dedication was required only as a condition to a land-use permit – the identical question at issue in the present case.

In *Nollan*, this Court developed a two-step approach. First, the government must have the authority to deny the permit altogether without otherwise causing a taking of property. 483 U.S. at 835-36. Then, and only then, can the government lift the ban and grant the permit subject to a "condition which serves the same legitimate police-power purpose as a refusal to issue the permit." 483 U.S.

at 836. In the case at hand, the Oregon Supreme Court recognized that conditions are allowed only as substitutes for outright prohibition. Appendix, A-15.[1] The question in this case, however, is how closely a court must scrutinize a condition to ascertain that it in fact takes no more than is necessary to satisfy the legitimate interest in protecting the public from adverse consequences in the use of property – the interest which must be sufficient to stand as the basis for an outright prohibition.

This Court explained the problem with allowing government to condition property usage on exactions which are not directly tied to an impact which would justify an absolute prohibition.

> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. . . . The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.

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[1] Although the Oregon Supreme Court recognized the condition is justified only if a refusal would be justified, it never evaluated whether the City of Tigard could have denied the Dolans' permit on the basis that the larger building would have created too great a burden on bicycle traffic or storm water drainage or recreational "greenway" needs.

Id. at 837. Using the ability to ban a particular land use to acquire something else results in a "leveraging of the police power" by adopting unnecessarily strict land use controls for the purpose of bargaining them away for something the government really wants, but cannot take directly without paying compensation. *Nollan,* 483 U.S. 837 n.5. The Court was and still should be concerned about the use of regulatory power to obtain public benefits without payment of compensation. Here the City will obtain a bicycle path, land for a storm drainage channel and a greenway for public recreation – improvements which the City has failed to prove are necessitated by Mrs. Dolan's new facility and which benefit far more than Mrs. Dolan or the customers or employees of the business in her building.

Nevertheless, the Oregon Supreme Court focused on what constitutes the necessary relationship between Mrs. Dolan's proposal and the conditions. Courts throughout the nation have developed a variety of tests for evaluating the relationship between conditions imposed on private land use and adverse impacts on legitimate public interests caused by such use. Among them are the rational nexus test,[2] the reasonable relationship test,[3] and the

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[2] *Jordan v. Village of Menomonee Falls,* 137 N.W.2d 442 (Wis. 1965).

[3] *Associated Homebuilders v. City of Walnut Creek,* 484 P.2d 606 (Cal. 1971).

specifically and uniquely attributable test.[4] Commentators have recommended still others.[5]

A focus on the level of scrutiny has the potential of missing the point. When employing the highest level of scrutiny – the compelling state interest test – the court weighs the value or importance of the government interest against the individual interest at stake. Here, the government interest need not be of the highest order[6]; it need only be one which is sufficient to deny the proposal without otherwise taking the property. Yet, the courts' job in reviewing regulations of property is far more than trying to imagine a rational basis as under the Due Process Clause. Nor should the court deferentially accept without justification and proof that the proposal actually generates the need for the restriction. The duty of the court is to make sure when the government asserts a need to take something from a specific property owner that the government **proves** it is taking no more than the property owner is responsible for providing to the public. Unlike the rational basis test of the Due Process Clause, hypotheticals, even though they may be rational or "imaginable," will not suffice. The regulation must actually solve a public burden which is demonstrably caused by the proposed use of the property, and no more.

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[4] *Pioneer Trust & Savings Bank v. Village of Mt. Prospect*, 176 N.E.2d 799 (Ill. 1961).

[5] *See, e.g.*, J. Delaney, L. Gordon & K. Hess, *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 Law & Contemp. Probs. 139 (1987).

[6] The Court in *Nollan* recognized that "a broad range of governmental purposes and regulations satisfies these requirements." 483 U.S. at 834-35.

Regardless of whether any of the lower courts' tests or some completely new phrase is employed, the name of the test is not nearly as important as how the test actually operates and how vigorously courts will enforce the legitimate application of that test. Whatever language is chosen, courts must be the guardians against Justice Holmes, warning:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

A. The Policies Underlying the Fifth Amendment Require Equivalence Between what the Government Takes and What the Government Gives in Return

In *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1892), the Court explained the Fifth Amendment's concern with ensuring that some citizens are not unevenly charged with the burdens of government.

> [T]here is a natural equity which commends [the right of just compensation] to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Id. at 325.

From this early discussion of the Just Compensation Clause it is clear that its purpose is based on preventing the public from loading upon one individual more than his or her just share of the burdens of government. Mrs. Dolan has been required to surrender far more than other citizens of Tigard – 10% of her land and the entire cost of actually constructing the bicycle path on her property. The only justification for requiring her to contribute more than any other taxpayer is if her proposal creates its own burdens on the city which she and only she should be responsible for resolving.[7] What was taken without compensation from Mrs. Dolan must be equivalent to the burdens her larger building is placing on society – that is burdens which are "more and different from" burdens caused by other members of society.

This Court went further in explaining that the entire notion of "just compensation" in the Fifth Amendment is "equivalence."

> The noun "compensation," standing by itself, carries the idea of an equivalent. . . . So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural

[7] Requiring property owners to pay for burdens to the public caused by a peculiar use of land is neither inappropriate, nor new. This Court has, for example, repeatedly allowed government to place the responsibility for creating railroad grade crossings on the railroads. "Having brought about the problem, the railroads are in no position to complain because their share of the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements." *Atchison, Topeka & Santa Fe Railway v. Public Utility Commission*, 346 U.S. 346, 352 (1953).

> import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. "No person shall be held to answer for a capital, or otherwise infamous crime," etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the "just compensation" is to be a full equivalent for the property taken. This excludes the taking into account, as an element of compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his property is appropriated, and leaves it, to stand as a declaration, that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.

148 U.S. at 326.

The problem with the Oregon Supreme Court's approach is its highly superficial review of the City's proffered "reasonable relationship" between the exaction and the construction of a larger building proposed by Mrs. Dolan. The scope of review employed by the court neglected to ensure that Mrs. Dolan bear only the burdens of her own making. The Fifth Amendment insists

that citizens be treated equally. Only those creating specific public burdens may be singled out to pay for addressing those burdens and only to the extent of their responsibility.

The Oregon Supreme Court ruled that the "reasonably related" test applied because it was used by this Court in *Nollan* when it accepted the California Coastal Commission's claim that the condition need only be "reasonably related." 483 U.S. at 838. However, this Court did not rule a "reasonably related" test was the standard. The Court accepted such language only "for purposes of discussion" because the California Coastal Commission was unable to prove that the condition was even reasonably related to any public harm. 483 U.S. at 838.

It was at this point this Court cited a list of cases indicating that conditions on the use of property which are not reasonably related to a public burden which would justify a total prohibition constitute a taking of property. The first in the list was *Parks v. Watson*, 716 F.2d 646, 651-53 (9th Cir. 1983), *cited in Nollan*, 483 U.S. at 839. The Oregon Supreme Court relied heavily on the *Nollan* decision's citation of *Parks*. Appendix A-12.

However, the Oregon Supreme Court failed to realize that *Parks*, like *Nollan*, involved a condition which had no connection to the proposal and, therefore, could not survive even the most "untailored" standards. *Nollan*, 483 U.S. at 838. In *Parks*, the property owner was told that the city would vacate platted streets only if the owner gave to the city his geothermal wells. 716 F.2d at 649. The Ninth Circuit could not imagine any connection between street vacation and the required give-away of private

geothermal wells. Just because the conditions in *Parks* and *Nollan* could not stand the most generous level of scrutiny does not mean the lowest level is the one that applies.

The Oregon Supreme Court also claimed that "[i]n *Nollan*, the Court did not purport to abandon the generally recognized 'reasonably related, test and, in fact, noted that its approach was 'consistent with the approach taken by every other court that has considered the question, with the exception of California.' " Appendix A-13 (quoting *Nollan*, 483 U.S. at 839).

The problem, however, is that this Court could not have been citing that list of cases for approval of the "reasonably related" test for several reasons. First, that test is not so "generally recognized" for not all the cases in the list used the "reasonably related" test. In fact, included in the list is *Pioneer Trust and Savings Bank v. Mt. Prospect*, 176 N.E.2d 799, 802 (1961), which developed a test considered to be the strictest: the specifically and uniquely attributable test. Second, at the time of *Nollan*, California was one of the states that purported to use the "reasonably related test." *See Associated Homebuilders v. City of Walnut Creek*, 484 P.2d 606 (Cal. 1971). So expressly excluding California from the list made no sense if this Court were placing its stamp of approval on the "reasonably related" test. What all those state judiciaries, except California, agreed upon was that exactions which do not "remedy any additional [burden] caused by the construction of the Nollans' new house . . . cannot be treated as an exercise of its land-use power." 483 U.S. at 838-39.

In short, this Court has never adopted the "reasonably related" test as the standard for land use conditions. As illustrated by the inequitable and harsh, unjust result which the Oregon Supreme Court has permitted to stand here by its application of that test, it fails to ensure that individuals are not charged with disproportionate costs of the business of government or of achieving the strong public desire to improve the public condition.

B. Conditions on Permission to Use Privately Owned Land Must Alleviate Real Burdens – Not Ones Which are Merely Hypothetical or Imagined

Nollan made clear that in order for a condition to be imposed on the use of private property, the government must do more than merely assert that the condition is legitimate in a conclusory fashion. While the dissent in *Nollan* argued that the Coastal Commission could easily demonstrate a connection between the building of a larger home and the easement exaction, the majority rejected that claim by stating the Fifth Amendment requires more than merely reciting talismanic findings. Specifically, this Court stated:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction,

> since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement rather than the stated police power objective.

Nollan, 483 U.S. at 841 (emphasis in original).

Also, the Court's discussion and contrast of the Takings Clause with the rational basis test of the Due Process Clause mandates that courts not attempt to justify conditions to alleviate hypothetical burdens or ones which may be "assumed."

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved. Agins v. City of Tiburon, 447 US 255, 260, . . . not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.3 (quoting 483 U.S. at 843 (Brennan, J., dissenting) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981))). This Court required more than the speculative, hypothetical, or assumable justification often allowed under the rational basis test of substantive due process and specifically rejected regulatory purposes which appeared to be "made up." 483 U.S. at 839 n.6.

This is where the Oregon Supreme Court took an unmistakable departure from this Court's decision in *Nollan*. The Oregon court relied on hypothetical or

"assumable" burdens to supposedly justify the demand that Mrs. Dolan give up some of her property. These are the City's critical "findings."

> It is reasonable to **assume** that customers and employees of the future uses of this site **could** utilize a pedestrian/bicycle pathway adjacent to this development for their transportational and **recreational needs.**
>
> In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to **expect** that some of the users of the bicycle parking provided by the site plan will use the pathway adjacent to Fanno Creek if it is constructed.

Appendix G-24 (emphasis added).[8]

The City did not prove anything about the Dolans' proposal. (In fact, it placed the burden on the Dolans to prove that the taking of property was unconstitutional. Appendix G at G-7, G40.) Nevertheless, the City merely concluded that it could assume that some employees or customers of the plumbing business might use the pathway. Of course, they may also visit other facilities operated by the City of Tigard as well. Under the Oregon

---

[8] It is wrong to conclude that the pathway is merely completing the owner's plans to promote bicycle traffic. Bicycle racks are required by the city code. Appendix G-21 ("The proposed development would be provided with adequate bicycle parking as required by Code Section 18.106.020P which requires one bicycle rack parking space for every 15 auto spaces, or portion thereof").

Supreme Court's analysis there is no reason Mrs. Dolan or people like her could not be singled out to provide a wide array of resources to potential customers of the electrical and plumbing supply store.

As discussed above, this Court's contrast of the Taking Clause to the rational basis test of the Due Process Clause belies the notion the level of review is so minimal as to allow "assumed" impacts to suffice. Yet, the Oregon court's reliance on a "reasonably related" test, and the superficial, deferential manner in which the court applied that test, in all practicality operates more like the rational basis test of the Due Process Clause than anything else.

The City of Tigard's ordinances indicate that all new development must contribute to the bicycle path and the greenway and the storm drainage if the owner happens to own property in the path of these proposed improvements. The City code only applies to land which is in or adjacent to floodplain. *See* Appendix K (Tigard Community Development Code, section 18.120.180) and Appendix J (policies indicating the same). Therefore, if new development occurs on property the City has no interest in acquiring, the new development has nothing to dedicate and is off the hook regardless of its impact on bicycle traffic or storm water runoff. A bicycle shop – an obvious generator of bicycle traffic – does not need to dedicate land for the creation of bicycle paths if the shop's property is not located along the proposed pathway. Proposals which may equally increase the impervious surface area but do not include land in the floodplain are not subject to the conditions imposed on Mrs. Dolan, even though the impacts, if any, are identical.

This Court in *Nollan* warned about such abuses.

> If the Nollan's were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Nollan, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

The Oregon Supreme Court has allowed the City of Tigard to force Mrs. Dolan to give her property because it has marked it out as desirable for a municipal improvement without any proof that she has contributed to the public need for these improvements more than any other Tigard landowner.

Moreover, the Constitutional analysis should not focus on a theoretical "connection" between the development and the condition. It hinges on **causation.** Mrs. Dolan is responsible only for the damage or burdens she causes. And as causation of harms becomes diffuse and difficult to assess, there is a longstanding solution to meeting public burdens not created by parties who can be fairly charged with paying for the burdens they inflict: taxation. That individuals must pay only for the harms they are distinctly responsible for is an equitable principle that is part and parcel of the Fifth Amendment.

C. Conditions Imposed on Permission to Use Privately Owned Land Must be Proportional to the Burdens to the Public Caused by the Use

When it is appropriately determined that a particular land use could be denied because of its deleterious impact on the general welfare, a condition to alleviate the impact as a prerequisite to lifting the prohibition can be said to be sufficiently related to burdens **caused by** the proposed use only if the use is restricted in a manner which is proportional to the impact caused by the private landowner. While Mrs. Dolan's proposed larger building may have had some burden on the City's storm water drainage system, she must not be saddled with contributing more than her fair share – that is paying a greater share of the system than other members of the community. If she is required to pay more than her fair share, she would be – as one court has put it – the victim of government-sponsored "grand theft."

> While in general subdivision regulations are a valid exercise of the police power, made necessary by the problems subdivisions create – i. e., greater needs for municipal services and facilities –, the possibility of arbitrariness and unfairness in their application is nonetheless substantial: A municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become grand theft.

Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976).

Also prior to *Nollan*, the New Jersey Supreme Court recognized that land use exactions have the potential to be abused by imposing on the owner of private land more than the cost of alleviating the burden caused by the land use in order to subsidize benefits to the general public. "It would be impermissible to saddle the developer with the full cost where other property owners receive a special benefit from the improvement." *Divan Builders, Inc. v. Planning Board of the Township of Wayne*, 334 A.2d 30, 39 (N.J. 1975). This, of course, complements the principle of equivalence that the landowner pays her fair share and society pays its share. "To do [otherwise] would result in patent discrimination in the treatment afforded the subdivision property as contrasted with the other properties specially benefited by the improvement." *Id.* at 40.

Unfortunately, Mrs. Dolan's property lies in the path of proposed government improvements. That was the only reason the ordinance even applied to her. However, if the bicycle path or storm drainage channel is ever completed without all other property owners having given up their land when applying for a new land use permit, that portion of the path and channel can be acquired only by eminent domain. Hence, Mrs. Dolan must suffer the indignity of knowing that her neighbors will be paid for their land; she was required to hand hers over to the City.

There is nothing in the City's "findings" to guarantee proportionality or even to quantify the increased need for bicycle paths occasioned by increasing the plumbing store's size, if any need will occur at all. As noted by dissenting Justice Peterson, it appears that the City is more concerned about having an uninterrupted pathway

than with making sure that those who create the "need" for the pathway, pay for it. Appendix A-23. A similar concern was raised and rejected in *Nollan*.

> "Finally, the Commission notes that there are several existing provisions of pass and repass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decision. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment." App. 68.
>
> That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization.

Nollan, 483 U.S. at 841. A comparison with the City of Tigard's "findings" and the argument by the California Coastal Commission reveals they are essentially the same.

The City's "findings" to support the dedication of the floodplain for the greenway fare no better.

> [T]he Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site thereby increasing the site's impervious area. The increased impervious surface would be **expected** to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a

> significant increase in stream flows after periods of precipitation.

Appendix G-37 (emphasis added).

As explained by dissenting Justice Peterson, there is no identification of how much storm water runoff will increase – perhaps a "thimbleful." Appendix A-26. Similarly, demanding the dedication of property within the 100-year floodplain for storm water purposes while at the same time requiring a dedication of land **outside** the 100-year floodplain for reconstruction of a flood control channel suggests that the City is interested in something other than storm drainage for the floodplain. Appendix at G-42. The real reason for requiring the dedication of land within the floodplain has nothing to do with storm water, but is candidly revealed in the City's ordinance itself:

> Fanno Creek Park . . . lies within the 100-year floodplain and immediately abuts the subject property along its southwestern property line. It is hoped that the entire park will eventually contain 35 acres. The dedication of the land within the 100-year floodplain and the eventual construction of a pathway in that area on the subject property is consistent with the City's park plans for the area.
>
> In the City's Master Plan for Fanno Creek Park, it is stated that Fanno Creek Park is intended to become the focal point for community, cultural, civic and recreational activities. A paved urban plaza, and amphitheater, an English water garden, pathways, a tea house, a man-made enlargement of the existing pond, as well as preserved natural areas are all components foreseen for this area.

Appendix G-42. While these plans for community recreational facilities may be legitimate, the plan to acquire the land by holding Mrs. Dolan's permit hostage is not.

In the present case, there was no proof advanced by the City that Mrs. Dolan was paying only her fair share of contributing to the city's greenway needs, bicycle paths and storm drainage system because there was no inquiry into proportionality. This Court should compel such an analysis of proportionality in order to verify that the condition or restriction imposed on property use is truly related to public burdens caused by such use, and no more. Without such proof, the City must pay for the private land it wishes to take to improve the public condition.

II

THE COURTS HAVE THE OBLIGATION TO ENSURE THAT GOVERNMENT PROVES THAT ITS CONDITIONS IMPOSED ON PERMISSION TO USE PRIVATELY OWNED PROPERTY ARE ONLY NECESSARY TO ADDRESS ACTUAL PUBLIC BURDENS CAUSED BY THE PROPOSED LAND USE

Also in *Monongahela* this Court emphasized the importance of the role of the courts to ensure that government does not take unfair advantage of private citizens.

> "The right of the legislature of the State, by law, to apply the property of the citizens to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent,

> or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of the courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.

148 U.S. at 327-28 (quoting *Isom v. Mississippi Central Railroad*, 36 Miss. 300, 315 (1858) (emphasis in original)).

Moreover, concern with the potential of government to overreach to serve its own financial advantage is not a relic of jurisprudence of an earlier century. Last month, this Court recognized that individuals should not be deprived of their real property unless there is first a judicial determination of the propriety of such a deprivation. *United States v. Good*, 62 U.S.L.W. 4013 (Dec. 13, 1993). The interest in judicial protection of property devoted to the plumbing supply business is no less than the real property of accused criminal defendants.

However, one of the inherent injustices facing Mrs. Dolan is that the Oregon land use system requires that she first present her objection that the government regulation causes a taking to the local government itself. ORS 197.835(2). Then, the exclusive review of the local government's decision is in the Land Use Board of Appeals (ORS 197.825(1)), with the potential of subsequent review at the Oregon Court of Appeals, and perhaps the Oregon Supreme Court. However, at each level, the scope of review is merely a look to see if the City of Tigard had

substantial evidence to support its decision. ORS 197.830(13)(b).

Inverse condemnation claims are not heard in Oregon trial courts until the Land Use Board of Appeals (LUBA) rules that a particular land use decision is unconstitutional or, in other words, that the government's finding of no taking does not have a scintilla of evidence to support it. *Dunn v. City of Redmond*, 735 P.2d 609, 612, 614 (Or. Sup. Ct. 1987) (LUBA jurisdiction is primary agency jurisdiction; compensation claims must wait until LUBA rules the land use decision is unconstitutional).

Naturally, the incentive for a local government to find that it did not violate the Constitution or that it owes no compensation to a landowner subjected to its regulation is quite high. The incentive is strengthened knowing that the Land Use Board of Appeals and further court review is powerless under Oregon law to rule against the local government if there is any evidence to support the government's findings.

Of course, this completely conflicts with this Court's concern expressed last month in *Good* and almost a century ago in *Monongahela* that government acting as judge and jury in questions of whether it must pay money and how much is owed cannot be tolerated.

Justice Peterson in his dissenting opinion assumed that the majority placed the burden of proving the constitutionality of the conditions on the government imposing them. Appendix A-18. However, reciting generalizations and assumptions is insufficient to prove causation in tort; it should receive less tolerance under the strictures of the Constitution.

The City of Tigard must do more than provide some evidence. It must prove a causal connection between Mrs. Dolan's larger building and the asserted need for the land it has demanded. And the Fifth Amendment must not tolerate government being the judge in a constitutional claim against it.

CONCLUSION

The hallmark of the Just Compensation Clause is justice. Equal treatment, proportionality, fairness are all wrapped up in that concept. Justice Holmes' warned in 1922 that the pressure to improve the public condition is strong. The Constitution must be enforced by courts who are not limited to superficial review of self-serving government declarations, but which are zealous guardians of the just principle that everyone pay their fair share and no one is saddled with an inordinant burden.

As government increasingly looks for new ways to provide public benefits, the insistence that those who seek a government permit satisfy the government's plans in order to obtain the permit will increase. As explained by Justice Beezer in his dissent in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1997 (1992), "legislators find it politically more palatable to exact payments from developers than to tax their constituents. The Takings Clause prohibits singling out developers to bear this burden." 941 F.2d at 876 (Beezer, J., dissenting).

If the Oregon Supreme Court decision in the present case remains, singling people out will become the order

of the day, for it is far easier to place public burdens on relatively small groups of people than it is to proportion burdens evenly throughout society. Amici curiae respectfully requests the Court to reverse the decision of the Oregon Supreme Court in this case.

Respectfully submitted,

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FLORENCE DOLAN,
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v.

CITY OF TIGARD,
Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, PENNSYLVANIA LANDOWNERS' ASSOCIATION, INC., AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 18
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Jackman v. Rosenbaum Co., 263 Pa. 158 (1919) 24
Jenad, Inc. v. Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966) . . . 15

Jordan v. Village of Menomonee Falls,
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*Longridge Builders, Inc. v. Planning Board
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Lucas v. South Carolina Coastal Council,
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Pennsylvania Coal Co. v. Mahon,
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People v. Brooklyn, 4 Comstock 419 (1851) 24
*Pioneer Trust and Sav. Bank v. Village of Mount
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Plote, Inc. v. Minnesota Alden Co., 52 Ill. 550,
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Pumpelly v. Green Bay Company,
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Simpson v. City of North Platte, 206 Neb. 240,
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State Housing Council v. City of Lake Oswego,
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United States v. Alvarez-Machain,
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United States v. Carolene Products Co.,
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United States v. Rauscher, 119 U.S. 407(1886) . . . 25
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U.S. Const. Amend. V . . . . . *passim*
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31A *C.J.S* (1964) 15
American Law Institute's *Model Land Development Code* (1976) 14
Bay Area Council, *Taxing the American Dream: Development Fees and Housing Affordability in the Bay Area* (1988) 21
Final Report of the Governor's Task Force on— Spectrum—*Housing For Economic Growth* (Maryland, December 1, 1990) 21
Hagmen, *Urban Planning and Land Development Control Law* (1975) 9
Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119 (1964) 21
Johnston, *Constitutionality of Subdivision Control Exactions:The Quest for a Rationale*, 52 Cornell L.Q. 871 (1967) 8, 9, 13
Kean, *Money Payment Requirements as Conditions to the Approval of Subdivision Maps: Analysis and Prognosis*, 9 Villanova L.R. 294 (1964) . . . 8
Mandelker, Daniel R., & Roger Cunningham, *Planning and Control of Land Development: Cases and Materials* (3rd ed. 1990) 26
Mandelker, *The Shifting Presumption of Constitutionality in Land-Use Law*, in Young, *1991 Zoning Law Handbook* 409, 419 (1991) . . 15
McQuillan, 14 *Municipal Corp.* (3d. ed. 1987) 24
Michelman & Sandalow, *Government in Urban Areas*, (1970) 24
U.S. Dep't of Housing and Urban Develop., *"Not In My Back Yard" Removing Barriers to Affordable Housing*, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing (1991) 21

The Report of the Presidents Commission on Housing, reprinted in F. Strom, editor, *1983 Planning and Zoning L. Rep.* §§ 17.01 *et seq.* (1983) 21
White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives* in Young, *1992 Zoning and Planning Law Handbook*, 301 (1992) 27
Williams, 1 *American Land Planning Law* (1988) . . 15

IN THE
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OCTOBER TERM, 1993

No. 93-518

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, PENNSYLVANIA LANDOWNERS' ASSOCIATION, INC., AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with over 100,000 members and supporters nationwide, many of whom are small business owners and property owners who are subjected to a variety of exactions imposed by regulatory authorities at the local, state, and federal level as conditions on the reasonable use of their property. WLF devotes a substantial portion of its resources to litigating cases dealing with property rights in this and other courts. *See, e.g., Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2887 (1992). More pertinently, WLF appeared as an *amicus* in the instant case before the Oregon Supreme Court and in this Court in support of

granting the petition, and can bring a broader perspective to the issues than the parties before this Court.

The Pennsylvania Landowners' Association, Inc. (PLA) is a not-for-profit corporation dedicated to the protection of property rights and economic opportunity while promoting responsible environmental stewardship. Formed in 1987, the PLA is based in Waterford, Pennsylvania, and has also filed an *amicus* brief in *Lucas*.

The Allied Educational Foundation (AEF) is a nonprofit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and economics, and has appeared before this Court as an *amicus* with WLF in *Lucas*, in the instant case in support of the petition, and in other constitutional cases.

This brief is filed with the written consents of the parties which are on file with the Clerk of the Court.

INTRODUCTION AND STATEMENT OF THE CASE

In the interests of judicial economy, *amici* Washington Legal Foundation, *et al.*, adopt by reference the statement of the case as presented in the brief filed by Petitioner Florence Dolan. Nevertheless, *amici* will briefly present those aspects of the case that are pertinent to the arguments presented in this brief.

The Petitioner, Florence Dolan, owns a 1.67 acre commercial lot on Main Street in the City of Tigard, Oregon. The lot is currently occupied by a 9700 square foot building used for the operation of a retail electric and plumbing supply store. The lot is contiguous to Fanno Creek, a small stream that runs adjacent to the lot. Petitioner and her late husband, John T. Dolan, proposed to expand their business by tearing down the existing building and by erecting a new 17,600 square feet building more suited to their needs and the needs of their customers. Together with her late husband, Petitioner

applied to the city for the appropriate permits. The city was disposed to grant the permits but also imposed certain conditions on their issuance, one of which is the subject of this appeal.[1] More particularly, the City required as a condition for site plan approval that the Dolans dedicate to the city: (1) all of the portions of their lot lying within the 100-year floodplain, for use by the city as a greenway; and, (2) an additional 15 foot strip of property adjacent to and above the 100-year floodplain, for use for future reconstruction of a storm drainage channel and as a public pedestrian/bicycle pathway.

The Dolans initially appealed the permit conditions to the Oregon Land Use Board of Appeals (LUBA) alleging a violation of the Fifth and Fourteenth Amendments to the United States Constitution. LUBA dismissed this appeal, however, because, in its view, the Dolans' federal constitutional claim was not yet "ripe." LUBA was of the opinion that this Court's decisions in *MacDonald, Sommer, Frates v. Yolo County*, 477 U.S. 340, 348 (1986) and *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 189 (1985) precluded Mrs. Dolan from seeking judicial relief "*if* the variance process... is an available administrative means for petitioners to seek relief from the disputed condition..." *See Dolan v. City of Tigard*, 20 Or. LUBA 411, 425-426 (1991); Pet. App. E-15, E-18 (emphasis in original). [2] The Dolans dutifully

---

[1] In addition to the dedication requirements at issue in the case at bar, the city also imposed separate impact fees in excess of $14,000 for transportation and stormwater runoff management, and it required the Dolans to relocate the "footprint" of their building to accommodate the future relocation of the floodplain bank of Fanno Creek. *See* Pet. App. G-15, G-44, G-45.

[2] While the Dolans have complied with LUBA's variance requirement and the issue is not now before this Court, *amici* nevertheless do not believe that LUBA correctly construed this Court's decisions. While variances are a common feature of modern land use law, they generally are provided, and require the applicant to demonstrate, that the hardship complained of is unique to a particular parcel and not

(continued...)

applied to the city for a variance which was denied by the city. Mrs. Dolan then initiated this appeal which was successively rejected by LUBA, the Oregon Court of Appeals and now by the Oregon Supreme Court, sitting *en banc*. Mrs. Dolan now appeals to this Court.

In 1973, the State of Oregon enacted a law requiring local governments to adopt comprehensive land use plans in compliance with statewide land use goals. One of the state land use goals, Goal 5, requires local governments to provide programs to protect, *inter alia* "[l]and needed or desirable for open space." Pet. App. I-1. Another goal, Goal 12, requires local governments to adopt a plan providing for a safe, convenient and economic transportation system which would "consider all modes of transportation including... bicycle and pedestrian." Pet. App. I-2. State law does not prescribe any particular means of achieving these noble goals; however, concerning open space, it does encourage local governments to use "fee acquisition...preferential assessment, development rights acquisition and similar techniques...." Pet. Brief on the Merits at A-5.

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[2](...continued)
shared generally by other properties in the zoning district. Thus, § 18.134.050.A.2. of the Tigard, Or. Community Development Code required Mrs. Dolan to show that there were "special circumstances that exist[ed] which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, ***and which are not applicable to other properties in the same zoning district*** (emphasis added)." The case at bar concerns a blanket exaction that "plunder[s] landowners generally," *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2887, 2899 n. 14, (1992), who happen to own land within the restrictive geographic region of Fanno Creek. Furthermore, not only was Petitioner's application for a variance futile, but even if the city had granted Petitioner's application, that would have done nothing to cure the underlying constitutional defect in the ordinance here subject to challenge, though it might have relieved the burden of this one individual property owner. *See, e.g., Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297, 299 (1980) (rejecting an administrative exhaustion defense under comparable circumstances).

The city has adopted a comprehensive land use plan to comply with the requirements of state law. The plan, last revised in 1983, includes a finding that the city would develop policies to retain "a vegetative buffer along streams and drainageways, to reduce runoff and flood damage and provide erosion and siltation control." Pet. App. J-1. The city's plan for Fanno Creek proposes to implement this noble policy by requiring the "dedication of all undeveloped land within the 100-year floodplain plus sufficient open land for greenway purposes specifically identified for recreation within the plan." Pet. App. J-1, 2. The dedication requirement applies to all proposals for development along Fanno Creek irrespective of the extent to which the proposals contribute to the need for the land dedicated or the portion of the tract that is located within the 100-year floodplain.

The question presented concerns principally the proper interpretation of this Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), which all parties concede controls the case at bar. To justify its exaction in this case, the city has made a series of "findings" which it believes establishes that the dedication requirements are "reasonably related to the applicant's request to intensify the development of this site."[3] The "findings" fairly establish that Petitioner's proposed intensified use of the site may contribute in at least some degree to the city's general need for additional improvements to its transportation infrastructure (including pedestrian/bicycle pathways), and for public stormwater management in the Fanno Creek watershed. But the "findings" do not attempt further to qualify or quantify this contribution. Nor do they explain why Mrs. Dolan's contribution to the city's transportation, open space and stormwater management requirements exceeds the amount

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[3] The city's "findings" are quoted extensively by the majority and dissenting opinion's of the Oregon Supreme Court. *See* Pet. App. A-5, A-8; A-19, A-23.

covered by the impact fees which the city has already imposed for the same basic purpose.[4]

In its decision, the majority of the Oregon Supreme Court rejected Mrs. Dolan's contention that *Nollan v. California Coastal Comm'n*, *supra*, established a heightened standard of judicial scrutiny for exactions. In the majority's view, *Nollan* "tells us that an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve." Pet. App. A-15. Because the city's findings establish that Petitioner's intensified use of her land will contribute in at least some degree to the city's transportation, open space

[4] *See* note 1, *supra*. This example of regulatory "double-dipping" is uncommon in the sense that here, it is the same government agency which is seeking to justify two exactions based on essentially the same need. A more common practice is for different levels of government (*e.g.*, state and local, or state and federal) to each exact their sum, in land or money equivalent, while pointing to the same need as justification. In addition, two or more exactions are sometimes justified by giving the same need a different name, for example, by exacting a sum for open space needs, and then by exacting an additional sum for loss of general wildlife habitat. An extreme and particularly insupportable example of regulatory "double-dipping" is provided by Maryland's Forest Conservation Act (§ 5-1601 *et seq.* of the Natural Resources Article, Annotated Code of Maryland). The Act's afforestation requirement mandates, by means of a complex formula, the establishment and preservation, via covenants or other restrictive instruments (*see* § 5-1607(e)(2) of the Natural Resources Article) of between ¼ to 2 acres of forest land for each acre of forest land disturbed by development or other use of land (including land that currently has no forest on it). By committee amendment, the provisions of the Act, including afforestation, were made to apply also to "the area ***that is required by the local authority to be cleared of forest*** to meet certain recreational and open space requirements" and "the area ***that is necessary*** for the construction of stormwater management retention or detention facilities." Senate Bill No. 224, Chapter 225 of the Acts of 1991, The Laws of Maryland (p. 6, lines 10-18, and 25-32, striking proposed exemptions for these activities) (emphasis added). In view of the complexity of modern regulation, a "heightened" level of judicial scrutiny should require a reviewing Court to look not only at the individual regulation being called into question, but also at the cumulative impact of other applicable regulations affecting the use of land.

and stormwater management needs, the Oregon Supreme Court concluded that the city had satisfied its burden under *Nollan* to go forward with evidence sufficient to establish an "essential nexus" between the exaction and Petitioner's use of her land.

Justice Peterson dissented from the majority view. *See* dissenting opinion of Justice Peterson, A-17 *et seq*. In his dissenting opinion, Justice Peterson decried the facile and conclusory nature of the city's findings, which, while clearly demonstrating, in his view, the city's resolve to get the easements, failed to establish anything more than a speculative connection between the Petitioner's proposed use of her land and the need for the exactions. Citing the passage from *Nollan* which states that this Court views "the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination," 483 U.S. at 841, Justice Peterson concluded that the *Nollan* decision required more than the "theoretical nexus" established by the city's findings in the case at bar. Pet. App. A-19.

ARGUMENT

I. THIS COURT SHOULD ADOPT THE RATIONAL NEXUS TEST AS THE STANDARD FOR EVALUATING THE VALIDITY (WITHOUT JUST COMPENSATION) OF REGULATIONS THAT REQUIRE THE DEDICATION OR RESERVATION OF LAND (OR MONEY EQUIVALENT) AS A CONDITION FOR THE APPROVAL OR ISSUANCE OF PERMITS OR PLANS REGULATING THE USE OF LAND.

A. Most Courts Have Required The Application Of Some Standard Of Proportionality To Justify Developmental Exactions

The law of developmental exactions may be traced back to the subdivision platting statutes of the late nineteenth century which originally were developed to facilitate

the conveyance of land by reference to recorded plats instead of by metes and bounds.[5] Since at least the beginning of the nineteenth century, American cities have attempted to promote orderly growth by adopting general plans or maps specifying the desired location of future streets and parks, market places, drainage facilities, and other forms of public infrastructure.[6] But without some means of controlling the subdivision of land, these plans remained of little avail. Since a subdivision plat was already checked for accuracy before recordation, this must have seemed a logical point to control whether other rational planning requirements had been met.

Originally, adequate land was reserved for projected public improvements at the time of subdivision plat approval. The land was then opened using the power of eminent domain. Many states followed the practice of awarding just compensation as determined by a sheriff's jury, "'taking into consideration all conveniences and inconveniences, advantages and disadvantages arising [from the taking]', or 'all benefits and inconveniences'."[7] Revenues were then raised to meet the costs incurred by the exercise of eminent domain by means of special

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[5] *See* Kean, *Money Payment Requirements as Conditions to the Approval of Subdivision Maps: Analysis and Prognosis*, 9 Villanova L.R. 294, 296 (1964); and Johnston, *Constitutionality of Subdivision Control Exactions:The Quest for a Rationale*, 52 Cornell L.Q. 871 (1967)(hereinafter cited as "Johnston").

[6] *Bauman v. Ross*, 167 U.S. 548 (1897) notes that the general plan for Washington, D.C. was established in 1791 under the direction of President Washington. By an act of Congress of 1809, the proprietor of any lot or square in the Washington, D.C. was authorized to have it subdivided on submitting a plat of the proposed subdivision to the surveyor of the District of Columbia for certification and recordation.

[7] *Bauman v. Ross*, 167 U.S. at 566. In other words, when a part of a person's property was taken for a public improvement, the eventual award of damages would be reduced in proportion to the estimated increase in market value of the remainder of the person's property attributable to the improvement.

assessments levied, sometimes during the same proceedings, on those deemed specially benefited by the improvements.[8] At some point in time, it occurred that it might be more efficient to require the developer to both dedicate land for and to actually install the needed public improvements as part of the subdivision and development process. This was sometimes justified under the assumption that the developer would pass on the costs to those specially benefited by them, *i.e.*, the future subdivision residents.[9]

But while judicial scrutiny of subdivision control exactions dates back to the late nineteenth century,[10] most modern treatments of the subject begin with *Ayres v. City Council of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1 (1949).[11] In *Ayres*, the California Supreme Court upheld a municipal street exaction because it found the need for the street to be "***reasonably related*** to increased traffic and other needs of the proposed subdivision." *Id.* 207 P.2d at 8 (emphasis added). *Ayres* has given rise to widely diverging interpretations, however. In *Parks v. Watson*, 716 F.2d 646, 651 (9th Cir. 1983), the Ninth Circuit Court of Appeals presented *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, 94 Cal Rptr 630, 4 Cal.App.3d 633, 484 P.2d 606 (1971) and *Pioneer Trust and Sav. Bank v. Village of Mount Prospect*, 22 Ill.2d 375, 176 N.E.2d 799 (1961) as paradigmatic of the two poles in the modern debate over developmental exactions.

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[8] *See Norwood v. Baker*, 172 U.S. 269 (1898) for a collection of early cases dealing with special assessments.

[9] *See Divan Builders, Inc. v. Planning Bd. of Tp. of Wayne*, 66 N.J. 582, 334 A.2d 30, 39 (1975).

[10] *See* Johnston, *supra* note 5, at 876-886.

[11] Hagmen, *Urban Planning and Land Development Control Law*, at 254 (1975) refers to *Ayres* as the "leading case on subdivision exactions."

Ironically, both of these decisions present themselves as relying on *Ayres*.

While the schema presented by *Parks* is probably an oversimplification, it will nevertheless serve as an adequate basis for framing the issue in this case. At the one extreme stands the approach taken by the California courts prior to *Nollan*, which has now been adopted by the Oregon Supreme Court. As originally enunciated in *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, *supra*, and later refined in *Grupe v. California Coastal Comm'n*, 212 Cal.Rptr. 578, 166 Cal.App.3d 148 (1985), the California courts held that a developmental exaction need not be directly related to the needs created by a developer's activity to be sustained. It is enough that the developer, either by himself, or in conjunction with others, contributes generally to the needs toward which the exaction is directed, even if his development itself derives no benefit from the exaction. In *Grupe*, the plaintiff's beach-front home was "one more brick in the wall separating the People of California from the state's tidelands." 212 Cal.Rptr. at 589 & n.11. As far as the California courts were concerned, that settled the matter.

At the other end of the judicial spectrum stands the approach taken by the Illinois Supreme Court in *Pioneer Trust and Sav. Bank v. Village of Mount Prospect*, *supra*. According to the Illinois Supreme Court, a developmental exaction is valid only if the burden cast on the developer is "specifically and uniquely attributable to his activity." 176 N.E.2d at 802. Thus, the need alleviated by the exaction must be created solely by the developer's activity and the benefit derived from the exaction must accrue solely to the assessed property. The Illinois Supreme Court has been followed by a number of leading cases. *See Billings Properties Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964); and *Frank Ansuisi, Inc. v. City of Cranston*, 107 R.I. 63, 264 A.2d 910 (1970).

The California rule places a heavy burden upon the developer to show that a particular exaction has *no* relationship whatsoever to a proposed development project. While it is more flexible than the old Illinois rule, it is also allows local governments "almost unlimited discretion in the imposition of dedication requirements." *Wald Corp. v. Metropolitan Dade County*, 338 So.2d 863, at 866 (Fla.D.C.A. 1976). The old Illinois rule, on the other hand, does substantially reduce the potential for taking by subterfuge, but places a heavy burden on municipalities to show a *specific* connection between a particular subdivision and a specific street or park or school. This task is especially difficult with regard to small residential subdivisions which contribute to the need for parks or roads or schools, but which lack sufficient land to dedicate for those purposes. The rigidity of the old Illinois rule explains why most courts have sought to find a middle ground between the two extremes.[12]

Within the middle of the spectrum of judicial thought, at least two --in their origins-- distinct schools may be identified. The first is the approach taken by the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966), and its progeny.[13] *Jordan* concerned the validity of an impact fee for parks and schools. The Wisconsin Supreme Court recognized that it was unrealistic to expect a municipality to show that a proposed exaction was *exclusively* attributable to a specific subdivision. While it retained the term "specifically and

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[12] The Illinois courts have themselves recently abandoned their old rule in favor of a more flexible "proportional and specifically attributable" standard. *Plote, Inc. v. Minnesota Alden Co.*, 52 Ill. 550, 96 Ill.App.3d 1260, 422 N.E.2d 231 (1981).

[13] *See Aunt Hack Ridge Estates, Inc. v. Planning Commission*, 160 Conn. 109, 273 A.2d 880 (1970); *Collis v. City of Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976); *Briar West, Inc. v. Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980); and *Call v. West Jordan*, 614 P.2d 1257 (Utah 1980).

uniquely attributable" as the proper yardstick for measuring the validity of exactions, it nevertheless noted that this standard was not to be applied too strictly so as to cast an unreasonable burden on municipalities.

The second school of thought occupying the broad middle ground is that taken by the New Jersey courts as exemplified by *Longridge Builders, Inc. v. Planning Board of Princeton Township*, 52 N.J. 348, 245 A.2d 336 (1968); and *181 Incorporated v. Salem County Planning Board*, 133 N.J.Super. 350, 336 A.2d 501 (1975). *See also*, *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980). In the typical New Jersey case, a road or some similar public improvement is projected on an official map or plan. As fate would have it, the projected infrastructure intersects a particular parcel of land proposed for development, or at least it is close enough that the development can be said in some sense to require it. The question, of course, is under what circumstances can the developer be forced to pay for the needed infrastructure? The answer of the New Jersey courts has been twofold. First, there must be a "substantial, demonstrably clear and [temporally] present" connection to the development project and the prospective infrastructure. *181 Incorporated*, *supra*, 336 A.2d at 506.[14] Second, the costs of the proposed improvement must be properly apportioned between the developer and the public. "[A subdivider may] be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision." *Longridge Builders, Inc. v. Planning Board of Princeton Township*, 245 A.2d at 337. Generally speaking, it may be said that the rules for the allocation of the costs are derived from the law of special assessments. *See Divan Builders, Inc. v. Planning Bd. of Tp. of Wayne*, *supra*, 334 A.2d at 39.

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[14] This is sometimes called a "cause and effect" relationship. *Pennell v. San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting).

The use of the term "rational nexus" within the context of developmental exactions would seem to have been popularized by Johnston, *supra*, note 5. The term does not occur in *Jordan* or the earliest cases following *Jordan*. Nor does it occur in any of the New Jersey cases prior to *Longridge*. In the first few decisions that do employ the term, it usually occurs in a quote or at least while citing Johnston.[15] Nevertheless, since *Wald Corp. v. Metropolitan Dade County*, *supra*, it has become customary to refer to both the *Jordan* and New Jersey schools in rather syncretistic fashion as the "rational nexus test" without further qualification.[16]

While the *Jordan* and New Jersey schools differ with regard to their historical origins, they are united by two factors which also serve to distinguish them from the approach taken by the California courts prior to *Nollan*. First, they place a substantial though not unreasonable burden on the municipal government to justify its exactions. *See Collis v. City of Bloomington*, 246 N.W.2d at 25 ("Standards can be developed and supported only after considerable data have been gathered and carefully analyzed"). *See also* Johnston, *supra* note 5, at 924. Second, they require a proper allocation of the public and private costs of proposed improvements, except in those circumstances where a particular development project, or group of projects, is the sole beneficiary of the projected improvements.[17]

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[15] *See, e.g., Collis v. City of Bloomington*, 246 N.W.2d at 24; and *Longridge*, 245 A.2d at 237.

[16] *See Wald*, *supra*, 338 So.2d at 867-868; and *Howard County v. JJM, Inc.*, 301 Md. 256, 280-81, 482 A.2d 908 (1984). *See also Batch v. Town of Chapel Hill*, 92 N.C.App. 601, 376 S.E.2d 22 (1989), *rev'd on other grounds*, 387 S.E.2d 655 (N.C. 1990).

[17] With regard to impact fees, definite rules have been established to prevent the commingling of funds and to ensure that funds are in fact expended within a reasonable period of time for the purposes for which they were ostensibly raised. *See Hollywood, Inc. v. Broward*

(continued...)

There are also numerous cases which do not fit easily into any particular school of thought. In *Gulest Ass'n v. Town of Newburgh*, 25 Misc.2d 1004, 209 N.Y.S.2d 729 (Super. Ct. 1960), *aff'd*, 15 A.D.2d 815, 225 N.Y.S 538 (App. Div. 1962), for example, a New York Court employed a "direct benefit" test, a term evidently borrowed from the law of special assessments. In *Swing v. Baton Rouge*, 249 So.2d 304 (La.App.), application denied, 259 La. 770, 252 So.2d 667 (1971), a Louisiana court declared a street exaction invalid because the proposed extension of the street served the "primary benefit" of the public at large. In *Home Builders Association of Greater Kansas City v. City of Kansas*, 555 S.W.2d 832, 835 (Mo. 1977), the Missouri Supreme Court held that a park dedication requirement or impact fee could be sustained so long as the burden cast on the developer was "reasonably attributable" to the developer's activity. In *Lampton v. Pinaire*, 610 S.W.2d 915 (Ky. App. 1980), a Kentucky court declared a street exaction reasonable so long as it was based on the "reasonably anticipated burdens" to be caused by the development. In *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex 1984), a Texas court adopted a "reasonable connection" standard to assess the validity of a park exaction, citing the American Law Institute's *Model Land Development Code* § 2-103 at 38 (1976).

While a few of the cases which we have cited above place the burden on the developer challenging an exaction to show that the necessary connection to the needs created by the developer's own activity is not present, *see*, *e.g.*,

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[17](...continued)
County, 431 So.2d 606, 612 (Fla. 4th DCA), *rev. denied*, 440 So.2d 352 (Fla. 1983). *See also*, *Banberry v. South Jordan City*, 631 P.2d 899, 903-904 (Utah 1981). Anyone who is familiar with the budgetary process understands how easily moneys reimbursed to the General Fund tend to "disappear" in the course of a fiscal year. Thus, money, precisely because it is *fungible*, is more easily diverted than land to purposes other than those for which it was ostensibly exacted. For this reason, monetary exactions pose an even greater risk of taking by subterfuge than do exactions of real property and should be subject to a comparable, if not higher, level of scrutiny.

City of College Station v. Turtle Rock Corp., *supra*; *Call v. West Jordan*, *supra*; *Billings Properties Inc. v. Yellowstone County*, *supra*; and *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966),[18] virtually all of the cases outside of California,

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[18] Most commentators have noted how *Nollan* placed the burden on government of going forward with legally sufficient evidence to establish an "essential nexus." *See*, *e.g.*, Williams, 1 *American Land Planning Law*, § 5A.04, at 140, 142 (1988) ("[T]he proposed reversal of the presumption [ordinarily accorded government regulations] footnoted by Justice Scalia... is really startling"); and Mandelker, *The Shifting Presumption of Constitutionality in Land-Use Law*, in Young, *1991 Zoning Law Handbook*, 409, 419 (1991). Unfortunately, *Nollan* failed to provide a rationale for applying presumption-shifting within the context of developmental exactions. While official acts, including the decisions of land use planners, are presumed valid and the ***initial*** burden is ordinarily on the one challenging those acts to go forward with evidence sufficient to permit the court to find otherwise, the practice of shifting this presumption onto government has occurred in a surprising variety of circumstances. For example, presumption-shifting has long been applied within the context of nuisance law when a governmental act has effected the summary confiscation or destruction of property. *See Applestein v. Baltimore*, 156 Md. 40, 49, 143 A. 666 (1928) (citing cases). *See also*, 31A *C.J.S* § 146, at 357 (1964). Common law also applies presumption shifting where the jurisdiction of an administrative or quasi-judicial agency is limited and depends upon the occurrence of specific facts prescribed by law. *Ibid.* In footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S Ct 778, 82 L Ed 1234 (1938), this Court opined that presumption-shifting might be appropriate "when legislation appears on its face to be within a specific prohibition of the Constitution... [or when legislation] restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Ibid*, 304 U.S. 152 n.4; *see also*, *Lucas v. South Carolina Coastal Council*, 112 S.Ct. at 2893 n. 6 ("Our analysis presumes the unconstitutionality of state land-use regulation only in the sense that *any* rule—with—exceptions presumes the invalidity of a law that violates it"). Footnote 4 of *Caroline Products* has received a good deal more attention among commentators than courts, however. *See generally*, Mandelker, *The Shifting Presumption*, *supra*.

Within the developmental exaction context, presumption- shifting was assumed by the Wisconsin Supreme Court in *Jordan*, *supra*, and later endorsed by Professor Johnston, *supra* note 5 at 924, and has subsequently been followed by other courts adopting the rational nexus

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and now Oregon, require some fair standard of apportionment of costs in accordance with the public and private contribution to the need for a public improvement. In most instances, these cases draw either explicitly or implicitly on the language of special assessments. *See, e.g., Bethlehem Evangelical Lutheran Church v. Lakewood*, 626 P.2d 668, 672 (Colo. 1981) ("The theory upon which the owner of the property abutting a street may be required to pay the costs of public improvements... is that the property is ***especially*** benefited by the improvements over and above the general benefit to the public at large")(emphasis in original).[19]

In the case at bar, both the majority and dissenting opinions of the Oregon Supreme Court acknowledge that *Nollan* requires the city to go forward with evidence that is legally sufficient to establish an "essential nexus"

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[18](...continued)
as the legal standard for judging the validity of exactions. *See, e.g., Howard County v. JJM, Inc.*, 301 Md. at 282 (invalidating a highway exaction because, "No such nexus has been shown [by the government] here"). Also to be noted is that this Court considered the "essential nexus" in *Nollan* as a potential ***affirmative defense*** at a time when it already had been persuaded that the forced dedication of a beach access easement otherwise would constitute a taking. *See Nollan*, 483 U.S. at 831 ("Had California simply required the Nollans to make an easement across beachfront available to the public on a permanent basis in order to increase public access to the beach... we have no doubt there would have been a taking"); *see also, Lucas v. South Carolina Coastal Council, supra*, 112 S.Ct. at 2925-26 (Souter, J., statement) (characterizing the majority opinion as a discussion of defenses to just compensation claims). In the case at bar, the city is requiring Mrs. Dolan to formally convey title to a portion of her land. Absent more, this usually constitutes a compensable taking. *See Yee v. City of Escondido*, 112 S.Ct. 1522, 1526 (1992) ("Where government authorizes a physical occupation of property (***or actually takes title***), the Takings Clause generally requires compensation") (emphasis added).

[19] The Oregon Supreme Court has itself acknowledged that a special assessment cannot be upheld without "some system of *just apportionment*." *MacVeagh v. Multnomah County*, 126 Or. 417, 270 P. 502 (1928) (emphasis added).

between the exaction and Mrs. Dolan's proposed use of her land. *See* Pet. for Cert., App. A-18 (Petersen, J. dissenting) ("As does the majority, I place the burden of proving these two elements [of *Nollan*'s nexus test] on the government that exacts the conditions"). And, in fact, the city has gone forward with certain "findings" which it believes satisfies the *Nollan* nexus requirement. The majority on the Oregon Supreme Court held that the city's findings sufficed as a matter of law to establish the required *nexus*.[20] The question is now before this Court as to whether the Oregon courts have applied the proper legal standard.

B. *Nollan* Requires Some Standard Of Proportionality To Justify Imposing Developmental Exactions Without Just Compensation

Initially, most courts and commentators interpreted the decision of this Court in *Nollan* as requiring a higher standard of judicial scrutiny for exactions than that heretofore required by the California courts. *See* Pet. for Cert. at 23-25. In *Commercial Home Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), a panel from the Ninth Circuit doubted whether *Nollan* had done anything to change the standard of scrutiny applicable to exactions. Subsequent to this Court's summary affirmance of *Commercial Home Builders*, *see* 112 S. Ct. 1997 (1992), a small number of jurisdictions appear to be vying with each other to see how far they can go before this Court will intervene.[21] The case at bar goes pretty far. At oral

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[20] While the city has consistently attempted to characterize Mrs. Dolan's claim as an assault on the factual basis of the city's "findings," the assertion is belied by the decisions of the Oregon courts which at all levels treated, and decided, the question as a matter of law. *See* Pet. Cert. Reply Brief at 3-4.

[21] Aside from the case at bar, two other recent cases are particularly troubling. *Cf. Pengilly v. Multnomah County*, 810 F. Supp 1111 (D.Or. 1992) (sustaining a blanket exaction requiring all persons who
(continued...)

argument before the Oregon Court of Appeals, the city conceded that Mrs. Dolan would be required to dedicate the same amount of land ***even if they were proposing to erect a "15 cubic foot fruit stand"*** instead of a 17,600 square foot building. *See* Petition For Review in Oregon Supreme Court at 24, *citing* Audio R. Tape, *Dolan v. City of Tigard*, 113 Or.App., 832 P.2d 853 (1992), argued 4-13-92, Cue No. 40.[22] While part II of the *Nollan* decision was couched in the terms peculiar to the argument in that case, it is clear that the underlying question was one of proportionality. The dissent clearly recognized that *Nollan* was requiring a closer relationship between the burden created by a proposed development and the condition imposed under the state's police power to mitigate that burden, than the California courts had hitherto required.

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[21](...continued)
happen to improve land adjacent to a public road to dedicate additional right—of—way); *and Ehrlich v. City of Culver City*, 15 Cal App 4th 1737 (2nd Dist. CA 1993), *petition for cert. filed*, 62 U.S.L.W. 3410 (U.S. Nov. 24, 1993)(No. 93-842)(sustaining impact fee based on loss of "recreational opportunities" ostensibly created by developer's discontinued operation of an unprofitable recreational facility).

[22] Thus, the case at bar represents precisely the sort of blanket exaction which the New Hampshire Supreme Court characterized as an "out-and-out plan of extortion" in *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981). *See also*, *Nollan v. California Coastal Comm'n*, 483 U.S. at 837. In response to Judge Richarson's (the presiding judge on the Oregon Court of Appeals) perplexed query, the city responded by protesting that, in the city's view, this was an as-applied, not a facial claim. Aside from the fact that the city's narrow characterization of Petitioner's claim is not true, *see* note 20, *supra*, it is difficult to see why this distinction should be any more determinative in this case than was the distinction between taking by regulation and taking by physical invasion in *Yee v. City of Escondido*, 112 S.Ct. at 1532. Indeed, since a facially confiscatory law violates Petitioner's rights "no matter how it is applied," *ibid*, it follows that it also violates Petitioner's rights ***as applied*** merely because it ***is*** applied, or, in the case of a claim for declaratory judgment, merely because its application is threatened. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (claim for declaratory judgment need not accrue to be ripe for judicial review).

Cf. Nollan, 483 U.S. at 842 (Brennan, J., dissenting) ("The Court finds this an illegitimate exercise of the police power, because it maintains that there is **no reasonable relationship between the effect** of the development **and the condition imposed**"); and *id.* at 865 (Blackmun, J., dissenting) ("I disagree with the Court's rigid interpretation of the **necessary correlation between a burden** created by development **and a condition** imposed pursuant to the State's police power **to mitigate that burden**") (emphasis added). Thus, in part III of the *Nollan* opinion, this Court relied on numerous state court decisions applying different proportionality standards. *See Nollan*, 483 U.S. at 839-40 (citing cases). While the *Nollan* Court disclaimed the need to decide **which** standard of proportionality should be applied to exactions, 107 S.Ct. at 3149, it arguably did require the application of at least **some** standard.

This Court's summary affirmance of *Commercial Home Builders v. Sacramento*, *supra*, is not to the contrary. Despite its verbal formulations to the contrary, the Ninth Circuit arrived at its decision in that case only after the city presented:

> a *careful study* reveal[ing] the *amount* of low-income housing that would likely become necessary as a direct result of the influx of workers that would be associated with the new nonresidential development. It assesses only a *small portion* of a *conservative estimate* of the cost of such additional housing.

941 F.2d at 874 (emphasis added). In other words, the exaction in that case *did* satisfy a heightened level of scrutiny.

The case at bar illustrates why heightened scrutiny should be required of exactions. The City of Tigard has found that it is "reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreation needs." Pet. App. at A-5, 6, quoting City of Tigard Planning Commission Final

Order No. 91-09 PC at 13, 20-21. And the majority of the Oregon Supreme Court believes that this "finding" should be sufficient to sustain the exaction in the case at bar. And yet, virtually the same finding could have been made if the city were proposing to construct a six-lane interstate freeway through Mrs. Dolan's lot. Surely, if the city were to build such a freeway, it would be "reasonable to assume" that Mrs. Dolan's customers would use it. Virtually ***every*** public improvement can be said to benefit *in some sense* ***both*** the developer and the general public. Under the standard adopted by the Oregon Supreme Court in the case at bar, virtually every exaction would be upheld.

In his dissenting opinion, Justice Peterson draws our attention to the growth in population currently experience by the State of Oregon and it is perhaps as a reaction to the perceived onslaught of *hoi polloi* that we are to attribute the highly deferential approach to exactions adopted by the majority on the Oregon Supreme Court.

Considered in its best light, the City of Tigard may be merely attempting to make those who intensify the use of their land to assume responsibility for the public consequences of their private actions. On the other hand, we know that governments at all levels are experiencing a shortage of funds due to the current restructuring in our national economy. Congress and state legislatures have an unfortunate propensity to impose mandates on local governments without providing the funds necessary to implement the mandates. And there is also strong public sentiment in virtually every corner of our nation against raising taxes. Local governments are all too often faced with tremendous pressures to shift the burden for needed public improvements onto some narrow segment of society. Developmental exactions are a particularly attractive alternative because their cost is paid for primarily by future residents who cannot as yet vote. They are also among the exclusionary devices commonly used by existing communities to keep certain people out (particularly those

who make less money than the current residents do).[23] Were it not for the impact fees which the city also is requiring Mrs. Dolan to pay for essentially the same needs (*see* note 1, *supra*), it might have been difficult to determine on present reading whether the City of Tigard is attempting to make Mrs. Dolan to pay her fair share, or whether it is attempting to accomplish some illicit purpose under the guise of the police powers. The city's own estimates of Mrs. Dolan's contribution to the needs ostensibly justifying the exaction in the case at bar place

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[23] *See State Housing Council v. City of Lake Oswego*, 48 Or. App. 525, 617 P.2d 655 (1980), *appeal dismissed*, 291 Or. App. 878, 635 P.2d 647 (1981) (acknowledging price increasing effects of impact tax on housing affordability but declining to subject tax to statewide planning goal concerning housing); and *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 520-524, 371 A.2d 1192, 1211-1212 (1977) (striking subdivision cash payment as exclusionary). *See also*, *"Not In My Back Yard" Removing Barriers to Affordable Housing*, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing (Washington 1991); *Final Report of the Governor's Task Force on--*Spectrum--*Housing For Economic Growth* at 28-29 (Maryland, December 1, 1990) ("Subdivision regulations can increase the direct cost of land by requiring land improvements and exactions —— particularly considering the increased tendency of local and county governments to negotiate substantial developer contributions and exactions as a condition for plat approval... In some cases subdivision regulations require improvements that exceed the demands of the prospective residents raising serious questions about the legality of these requirements on developers and the subsequent additional costs to a unit of housing"); Bay Area Council, *Taxing the American Dream: Development Fees and Housing Affordability in the Bay Area*, 14 (1988) (urging San Francisco Bay Area cities to consider exempting low income housing from impact fees); *The Report of the Presidents Commission on Housing*, reprinted in F. Strom, editor, *1983 Planning and Zoning L. Rep.* §§ 17.01, 17.04[5][e] (1983); and Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119, 1155 (1964). While there is no suggestion that the city here is motivated by anything other than the desire to obtain the needed public improvements without having to pay for them, the standard adopted by this Court in resolving this case will nevertheless be applied under circumstances and in locations where exclusionary sentiments are more pronounced.

the question beyond doubt. Even aside from the question of these impact fees, we know that other communities have survived more intense growth pressures than the State of Oregon currently does without suspending constitutional guarantees.[24] We also know that there are sound reasons of public policy for applying a heightened standard of judicial scrutiny to developmental exactions. As Justice Peterson suggested, "If in the fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely why the need in fact exists is a modest burden to place on the government." Pet. App. at A-29.

C. The Exactions Placed By The City of Tigard On The Dolans' Development Proposals Are Akin To Special Assessments And Are Thus Invalid Because They Are Imposed Under A General Rule Which Makes It Possible For The Assessment To Exceed The Benefit To The Land In Question, And Because The City Has Failed To Apportion The Costs According To The Benefits Received.

The principle of just compensation was not well established among the states prior to the Revolution; and while outright rejection of the principle among state courts seems to have been confined to the first few decades of the nineteenth century, practices inconsistent with the principle continued among the states for some time. *See Lucas v. South Carolina Coastal Council*, 112 S. Ct. at 2914-2917

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[24] Between July 23, 1959, and March 15, 1963, for example, the Village of Menomonee Falls, Wisconsin, approved 41 plats containing 638 lots. The village's population increased from 6,262 in 1950 to 18,276 in 1960, and to a then estimated population of 25,000 in 1964. *Jordan v. Village of Menomonee Falls*, 137 N.W.2d at 444. The Wisconsin Supreme Court ***sustained*** the park and school exaction there called into question under what we would now call the "rational nexus" test. Clearly, legitimate exactions have nothing to fear from meaningful judicial scrutiny.

(Blackmun, J., dissenting) (citing authorities). Gradually the principle of just compensation took hold, however, and by 1871, this Court could state that it had become "so essentially a part of American constitutional law that it is believed that no State is now without it...." *Pumpelly v. Green Bay Company*, 80 U.S. 166, 177 (1871).

As states incorporated formal just compensation clauses into their state constitutions, heretofore accepted practices became matters of constitutional concern.[25] While there are a few nineteenth century cases suggesting the application of the principle of just compensation to governmental regulation,[26] much of the early litigation seems to have focused on injuries sustain through the operation of municipal corporations. The construction and the operation of roads and railroads seems to have received much of the early attention.[27] Another common practice that evoked considerable early litigation, was the custom of financing needed public improvements by means of special assessments. *See Norwood v. Baker*, *supra* (citing many early cases).

Courts had little difficulty distinguishing the power of eminent domain from the power of taxation. "Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burthen [as

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[25] Prior to the adoption of the Fourteenth Amendment, the Just Compensation Clause of the United States Constitution applied only to the federal government, and not to the states. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

[26] *See, e.g., Moale v. Baltimore*, 5 Md. 314 (1854) ("[W]e regard the provision of the act of 1817 [*sub judice*] which denies to the proprietor the use of his land, as nothing short of an act of confiscation"); and *Aldrich v. Wright*, 53 N.H. 398, 421 (1873) (right to protect property may not be taken without just compensation).

[27] *See, e.g., Transportation Co. v. Chicago*, 99 U.S. 635 (1878); *Baltimore & P.R.R. v. Fifth Baptist Church*, 108 U.S. 317, 332, (1883); and *Richards v. Washington Terminal Company*, 233 U.S. 546 (1914) and the cases therein cited.

in original]," as one early court put it; but "[p]rivate property taken for public use by right of eminent domain, is taken not as the owner's share of contribution to a public burthen, but as so much beyond his share." *People v. Brooklyn*, 4 Comstock 419, 423 (1851). Some 40 years later this Court described the values underlying the Fifth Amendment's Just Compensation Clause in comparable terms. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (Fifth Amendment intended to prevent government from taking "something more and different from that which is exacted from other members of the public"). *See also*, *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Because something special was taken by means of eminent domain, courts reasoned that special compensation also was required.

The problem with special assessments is that not only is property literally ***taken*** by means of them, but it is taken in a manner that is ***new*** and ***different*** from what is required of the general public. Why then should not just compensation be paid? The general conclusion of the early litigation on the subject, subsequently adopted by this Court, is that, while a municipality may estimate the benefits received by a fair rule, *French v. Barber Asphalt Paving Co.*, 181 U.S. 324 (1901) (front footage method may be used to estimate benefits where all lots are similarly situated and of the same size),[28] a special assessment may be justified only if based on the ***special*** benefits received. *Norwood v. Baker*, 172 U.S. at 279; and *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478 (1916). *See also*, McQuillan, 14 *Municipal Corp.* § 38.02.10, at 29 (3rd. ed. 1987).[29] A comparable approach is taken

[28] *See*, *ibid*, 181 U.S. at 345 ("[A]ll of the lots abutting [on Forest avenue] front on the same street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley").

[29] Michelman and Sandalow question the continued viability of the *Norwood-Myles Salt* principle since, in their view, this Court has not relied on this principle since *Myles Salt*. *See* Michelman & Sandalow, (continued...)

concerning police power regulations governing the establishment of drainage and irrigation districts, *Wurts v. Hoagland*, 114 U.S. 606, 611 (1884); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896), and the erection of "party walls" and "partition fences." *Jackman v. Rosenbaum Co.*, 263 Pa. 158 (1919); and *Wurts v. Hoagland*, 114 U.S. at 611. Finally, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justice Holmes applied this doctrine to the Kohler Act.[30]

[29](...continued)
Government in Urban Areas, at 524 n.114 (1970). Aside from the fact that their conclusion derives from an erroneous factual premise, *see Nashville, C. & St. Ry. v. Walters*, 294 U.S. 405, 430 (1935), citing, *inter alia*, *Myles Salt*, the argument seems to assume that a decision by this Court loses its viability unless buttressed by an occasional footnote in the U. S. Reports. In view of this Court's decision in *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992), relying, *inter alia*, on *United States v. Rauscher*, 119 U.S. 407 (1886) and *Ker v. Illinois*, 119 U.S. 436 (1886), this assumption would not seem a particularly prudent one.

[30] *Cf.*, *ibid*, 260 U.S. at 415 ("It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property.... But that was a requirement for the safety of employees invited into the mine, and secured an ***average reciprocity of advantage***..."); *with ibid*, 260 U.S. at 422 (Brandeis, J., dissenting):

> The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be 'an average reciprocity of advantage' as between the owner of the property restricted and the rest of the community... Reciprocity of advantage is an important consideration, and may even be an essential, where the State's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects, *Wurts v. Hoagland*, 114 U.S. 606; *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112; or upon adjoining owners, as by party wall provisions, *Jackman v. Rosenbaum Co.*,[*supra*]. But where the police power is exercised, not to confer benefits upon property owners but to protect the public from detriment and danger, there is, in my opinion, no room for considering reciprocity of advantage.

(continued...)

In his dissenting opinion to this Court's decision in *Lucas v. South Carolina Coastal Council*, Justice Stevens stressed the importance of the concept of "singling out" in takings jurisprudence. 112 S.Ct. at 2923-24 (Stevens, J. dissenting).[31] While the majority disagreed with Justice Stevens' application of this principle to the case then at bar, it did agree that the concept of "singling out" was an important principle within the context constitutional adjudication under the Just Compensation Clause. *Ibid*, 112 S.Ct. at 2899 n. 14.

Zoning law has developed over the past three quarters of a century on the basis of concepts derived in large measure from nuisance law.[32] And, while courts have

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[30](...continued)
See also Chicago B. & Q. R. Co. v. Illinois ex rel. Grimwood, 200 U.S. 599 (1906) (Brewer, J., dissenting) (lamenting the lack of "***reciprocal benefits***" in that case)(emphases added).

[31] *Amici* are not certain whether Justice Stevens intends for us to understand the concept of "singling out" in the same sense, or by analogy to, the concept of proportionality under the law of special assessments. He does cite *Nollan* and *Pennell v. San Jose, supra*, to illustrate the precept. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. at 2923 (Stevens J., dissenting). In any event, *amici* believe that the principle which Justice Stevens urges might better be applied by looking at the *political* rather than geographic distribution of burdens incident on a regulation. A regulation may apply across a broad geographic cross-section without seriously impacting on a broad cross-section of the electorate, or at least on a broad enough cross-section of the parliamentary majority to effect a change in public policy.

[32] *See* Daniel R. Mandelker & Roger Cunningham, *Planning and Control of Land Development: Cases and Materials*, at 33-50 (3rd ed. 1990) (discussing exemplary nuisance cases). This is not to say that zoning law has ever been understood to be ***limited*** to the confines of nuisance law. It is merely that nuisance law more often than not has provided the conceptual framework within which zoning law's substantive values were articulated. This practice of drawing analogies from nuisance law was itself sanctioned by this Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 387 ("And the law of (continued...)

sometimes conceded the relevance of Justice Holmes concept of "mutual reciprocity of advantage," they have yet to agree on a consistent rationale for applying this principle within the context of traditional zoning laws. The case at bar, however, concerns a context to which the concepts of "singling out" and "proportionality" have long been applied with particular stricture. While cases such as *Norwood* and *Myles Salt*, cited above, were decided under substantive due process principles, and while this Court has acknowledged that the standards for determining a taking under the Due Process and Just Compensation clauses are not necessarily the same, *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3, generally, this Court has distinguished between the standards applied under the Due Process and Just Compensation clauses with a view towards conferring *added* protection under the latter. At a minimum, this Court's cases establish that some fair standard of apportionment of the public and private contributions of any need is required before a special assessment, or a regulation closely resembling a special assessment, may be sustained.

The rational nexus test, as it is now understood since *Wald Corp. v. Metropolitan Dade County, supra*,[33] provides the most workable framework for evaluating developmental exactions. It is a standard that provides substantial protection to property owners from "taking by subterfuge" and yet has proved workable in practice.[34] It places a

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[32](...continued)
nuisances, likewise, may be consulted, not f [32]or the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power").

[33] *See* discussion, *supra*, at p. 9.

[34] The refrain that "government scarcely could go on" is almost invariably canted as a defense in these circumstances, *ie.* when a particular government agency is left without any legitimate defense. Since there are so many states that have now adopted the rational nexus test and ***have*** continued to "gone on," *see* White, *Development* (continued...)

substantial, but not unreasonable, burden on municipal governments to justify their dedication requirements by showing how the dedication requirements or impact fees are proportionally related to the impacts caused by the developer. It also comes with a body of case law to guide in its application. *See* discussion *supra* at pp. 10-13. Even assuming, *arguendo*, that *Nollan* does not require application of the "rational-nexus" or "proportionally related" test, this test is certainly consonant with *Nollan*. The decision by the Oregon Supreme Court below certainly is not.

CONCLUSION

For the foregoing reasons and those specified in the brief for petitioner, *amici curiae* urge this Court to reverse the Oregon Supreme Court.

Respectfully submitted.

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Date: January 13, 1994

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[34](...continued)
Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives in Young, *1992 Zoning and Planning Law Handbook*, 301, 310 (1992) (noting that the "rational nexus" test is fast becoming the majority rule in the United States), it would now seem difficult to argue that the adoption of this standard by this Court will bring about the end of modern civilization as we know it.

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No. 93-518

(18)

In the
Supreme Court of the United States
October Term, 1993

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF OF DEFENDERS OF PROPERTY RIGHTS, MICHAEL L. ACHEN, ALLIANCE FOR AMERICA, AMERICAN ENVIRONMENTAL FOUNDATION, AMERICAN LOGGERS SOLIDARITY, ARIZONA CITIZENS COALITION ON RESOURCE DECISIONS, APPALACHIAN FOREST MANAGEMENT GROUP, CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS, COUNCIL ON PROPERTY RIGHTS, INC. (DAVID H. LUCAS), AS *AMICI CURIAE** IN SUPPORT OF PETITIONER

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ENVIRONMENTAL CONSERVATION ORGANIZATION,
FIFTH AMENDMENT FOUNDATION,
THE FISHERMAN'S COALITION,
HILL COUNTRY LANDOWNERS COALITION,
KONKOLVILLE LUMBER CO.,
MOLALLA TIMBER ACTION COMMITTEE,
NATIONAL CATTLEMEN'S ASSOCIATION,
NATIONAL WILDERNESS INSTITUTE,
NEW HAMPSHIRE LANDOWNERS ALLIANCE,
NORTHWEST TIMBER WORKERS RESOURCE COUNCIL,
REDWOOD REGION TELECOMMUNICATIONS,
SAVE OUR INDUSTRIES AND LAND,
STOP TAKING OUR PROPERTY,
TRANS TEXAS HERITAGE ASSOCIATION,
VIRGINIANS FOR PROPERTY RIGHTS,
WESTERN MINING COUNCIL, INC., and
WHITESTONE SOUTHEAST LOGGING CO.

QUESTIONS PRESENTED

1. Whether the government's exaction of private property as a condition of exercising one's constitutional right to use privately-owned property violates the Fifth Amendment.

2. Whether the government can single-out an individual property owner -- through an development exaction program -- to bear the burdens of public improvements which will benefit the community as a whole.

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WHITESTONE SOUTHEAST LOGGING CO.
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

Pursuant to Rule 37.3 of the Rules of this Court, the *amici* submit this brief *amici curiae* in support of Petitioner, Florence Dolan. The *amici* support reversal of the decision by the Supreme Court of the state of Oregon. Consent to the filing of this brief has been granted by counsel for Petitioner and counsel for Respondent, and has been lodged with the Clerk of this Court.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Reflected in this brief are the interests of millions of property owners who have joined together as a collective voice to ask this Court to enforce their constitutional rights in private property. Some of these are people whose livelihoods depend directly on the protections in property afforded by the Constitution. Others are owners of homes, leases, and other property interests such as buildings, machinery, retirement funds, savings accounts, and even ideas -- all of whom enjoy the use and benefit of private property ownership afforded by the Constitution. All of these diverse interests are before this Court because of their common understanding of the importance of private property rights as a fundamental component of individual rights and liberties rooted in the Constitution. Protection afforded to property rights in the Fourth and Fifth Amendments is the line drawn in the Bill of Rights to protect the individual and the fruits of his labor from being usurped by an overreaching government.

Many of the property owners who have joined together in this brief have firsthand experience of the ostensible schemes of government regulations which amount to "out and out extortion" -- such as the example at issue in this case. Many have themselves been victimized by a bureaucrat holding the ultimate big stick -- the ability to veto plans in which the individual's life savings are invested -- and have thus been forced to comply with the whims of the government. They know there is nothing "voluntary" when the government demands title to a portion of their property without paying for it. They have also seen how a community abandons the sole property owner when it is to be benefited from the exaction without fair compensation.

These individuals and organizations know that exactions can make the government an "intruder who enters clothed in the robes of authority in broad daylight [but who] commits no less an invasion of these rights than if he sneaks in at night wearing a burglar's mask. In some ways, entry by the authorities is more to be feared, since the citizen's right to defend against the intrusion may seem less clear." *Hendler v. United States*, 952 F. 2d 1375 (Fed. Cir. 1991). They know, too, the practical impossibility of taking on a government which can exhaust their resources. For all of these reasons, these *amici* echo Judge Jay Plager in his appeal that "[c]ourts should leave no doubt as

to whose side the law stands upon": the Constitution which protects private property rights. *Id.*

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. It was founded in 1991 in recognition that property rights are today under siege by excessive government regulations and acts which have the effect of rendering the Constitution a worthless scrap of paper. Its mission is to vigorously protect those rights considered essential by the framers of the Constitution and promote a better understanding of the relationship between private property rights and individual rights and liberties. Defenders is a non-profit, public interest law foundation whose members are property owners, users, and beneficiaries of the rights protected by traditional Anglo-American property law. Incorporated under the laws of the District of Columbia, Defenders of Property Rights is designed specifically for the purpose of participating in legal action affecting the public interest as well as the private property rights of its membership. Defenders of Property Rights engages in litigation across the country on behalf of its membership to stem government incursion forbidden by the Bill of Rights. Defenders of Property Rights has devoted a significant portion of its resources to the litigation of regulatory taking issues and participated in *Lucas v. South Carolina Coastal Council* case when it was before this Court.

Michael L. Achen (Battleground, WA) is a 29-year veteran of land development and building contracting, and the owner of his own contracting business. He believes that it is the duty of a contractor to provide for the health, safety, and welfare of the users of his development -- but not for the general recreation of the public unless that is the principal objective of the development.

The **Alliance for America** is a 50-state network of nearly 500 independent, grassroots property rights organizations whose collective membership represents millions of individual property owners all across the country. Groups under the Alliance's umbrella cover the full spectrum of property rights interests including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, and other private property protection.

The **American Environmental Foundation (AEF)** (Ocie Mills) (Navarre, Florida) was founded to bring a halt to property rights abuses that have become commonplace in America. AEF focuses on government abuse of constitutional protections in the name of protecting the environment. The organization's founder, Ocie Mills, possesses firsthand knowledge of how bureaucratic zeal to protect the "environment" can destroy lives and liberty. He and his son were both imprisoned for 21 months in a federal penitentiary for disturbing a wetland. A federal judge later ruled that the parcel of dry land designated by the government as a wetland may not even qualify as

such. AEF believes the environment can be protected within the framework provided by the Constitution.

American Loggers Solidarity (ALS) (Fortes, WA) is a broad-based, grassroots organization made up of individuals, small businesses, corporations, and elected officials at the city, county, and state level in seven states. Founded in 1989, ALS believes in the sanctity of individual rights as provided in the Constitution, recognizing that individual rights are the cornerstone of democracy and must be protected by elected officials, bureaucracies, and the judicial system.

The **Appalachian Forest Management Group** (Covington, VA) is a grassroots organization formed in 1986. Its purpose is to provide leadership and promote a balanced approach to forest management. The majority of its over 800 members are landowners committed to the principle that their property should not be taken for any public use without just compensation.

The **Arizona Citizens Coalition on Resource Decisions (ACCORD)** (Phoenix, AZ) advocates the responsible shared use of natural resources. Its members -- all of whom are landowners and representative of a broad range of interests -- believe that through the responsible management of land and resources found on it, society's present needs can be met without compromising the needs of the future.

Citizens for Constitutional Property Rights (CCPR) (Crestview, Florida) is a state-wide organization based in Florida whose mission is to secure private property guarantees provided in the Bill of Rights. CCPR is active with respect to public advocacy and awareness of governmental programs and regulations which violate the Constitution by eroding private property rights.

The **Council on Property Rights, Inc. (CPR)** (David H. Lucas) is a nationwide association formed to represent the interests of property owners in protecting their private property rights on a federal, state, and local level. David H. Lucas knows firsthand the devastating consequences for the owners of property which the government has taken without paying for it. His property was taken by excessive government regulation when the state of South Carolina refused to allow him to build the homes he had intended for two vacant lots. He was forced to take his fight to this Court in 1991. After a favorable ruling on June 29, 1992 by this Court, he was finally compensated in 1993 after remand to the courts in South Carolina.

Larry D. Elliott, P.E. is the owner of **Elliott Electrical Engineering (E^3)** (Moscow, ID). E^3 is a consulting engineering firm founded in 1988. Mr. Elliott believes that government is becoming too intrusive into the lives of American citizens and is concerned about the threat to his own private property rights.

The **Environmental Conservation Organization (ECO)** (Hollow Rock, TN) is a national umbrella organization of landowners and landowner associations working to balance environmental protection with economic vitality. ECO promotes free-market alternatives (based on the concept of private property rights) to federal regulations as the best method of protecting the environment. Its membership includes individuals, businesses, and nearly 500 local, regional, state, and national grassroots organizations that champion property rights and free enterprise. The outcome of the *Dolan* case has direct implications for more than seven million people who belong to ECO and its affiliated organizations.

The **Fifth Amendment Foundation** (Santa Monica, CA) is a non-profit corporation created to defend the rights of private property owners to a balanced and equitable implementation of existing or proposed development regulations consistent with the protections of the Fifth and Fourteenth Amendment to the Constitution.

The **Fishermen's Coalition** (Coronado, CA) was formed by fishermen and other concerned citizens committed to preserving their public way of life. Their goal is to promote and educate the public about responsible fishing practices and oppose environmental extremism. They believe that whenever private property is taken for public purposes -- either through regulations such as the Endangered

Species Act or Marine Mammal Protection Act -- just compensation must be paid to the owner.

The **Hill Country Landowner's Coalition (HCLC)** (Georgetown, TX) was formed in 1991 to oppose a local endangered species preservation plan to regulate land use and purchase a 30,000-acre wildlife refuge with taxpayer's funds. The coalition is committed to the principle that when the rights of the individual are threatened (as they are when the government is allowed to take private property for a greenway or bicycle path without compensating the owner), the whole fabric of American society is jeopardized.

The **Konkolville Lumber Company** (Orofino, ID) (Andy Konkol, Jr.) employs 75 people and has been in operation since 1947. Improper government takings could rob the company of productive timber land that is necessary to the livelihood of the company, its employees, their families, and beneficiaries of the goods and services that are produced, in part, by the company.

The **Molalla Timber Action Committee (M-TAC)** (Molalla, OR) was organized in 1989 to counter efforts by preservationist environmentalists to halt natural resource production on federal lands. The members of this grassroots organization believe that forests can be managed without destroying the ecosystem or economy -- balancing the needs of both people and nature.

The **National Cattlemen's Association (NCA)** (Denver, CO) is a non-profit trade association that speaks for 230,000 cattlemen and others from all segments of the beef cattle industry. It is affiliated with 46 state cattle associations and 29 national beef breed organizations. NCA's mission is to advance the economic, political, and social interests of the U.S. cattle industry, and works to create a positive business environment while providing consumers with a safe and wholesome product.

The **National Wilderness Institute (NWI)** (Washington, D.C.) is dedicated to using sound, objective science in implementing the wise management of natural resources. NWI recognizes the direct, positive relationship between progress and environmental quality and promotes private sector, constitutionally-based stewardship which enhances the use of resources without unnecessarily inhibiting economic growth. NWI supports environmentally-sound site and situation-specific practices which harness the creative forces of the private sector, protect or extend private property rights, and reduce the regulatory burden of government.

The **New Hampshire Landowners Alliance** (Campton, NH) was founded in 1991 as a non-profit, non-partisan, state-wide organization. It now has a membership of approximately 1,700 property owners. Its goal is to foster the conservation of natural resources in a manner consistent with the constitutional property

rights of all New Hampshire property owners. They participate in legal action when it is in the interest of its members, and when the issues will affect broad public policy.

The **Northwest Timber Workers Resource Council** (Elgin, OR) is a grassroots organization formed to represent the interests of people in the Pacific Northwest regarding the stewardship of nature. The Council advocates a balanced approach to forest management that saves jobs and respects the ecosystem.

The **Redwood Region Telecommunications (RRT)** (Fortuna, CA) project is dedicated to informing Americans about the importance of private property rights. RRT serves as an information clearinghouse to inform landowners -- particularly those in the Pacific Northwest -- about issues involving land use, environmental regulation, and property rights on a local and national level.

Stop Taking Our Industries And Land (SOIL) (Hines, OR) is a local chapter of the Oregon Lands Coalition. A grassroots organization, it is comprised of ranchers, loggers, miners, and businessmen interested in protecting their jobs and strengthening local economies. SOIL seeks to protect its members' property from confiscation by uncompensated government takings by encouraging legislation which requires its protection.

Stop Taking Our Property (STOP) (Porter County, IN), formed to fight the expansion of the Indiana Dunes National Lakeshore in

1991, is comprised of over 300 families who have been impacted by a variety of government policies involving property rights. Members of STOP believe that government should be bound by constitutional protections of property -- whether it be the issuing of permits, filling wetlands, or building new stores.

The **Trans Texas Heritage Association (TTHA)** (Alpine, TX) is a state-wide organization dedicated to the protection of landowner rights. Founded in 1991, their members collectively own over 15 million acres of land in Texas and other states. Members of TTHA believe private property rights are the cornerstone of the freedoms and liberties protected by the Constitution, and environmental regulations and government land acquisitions limit the spectrum of private property ownership.

The **United Property Owners Association (UPOA)** (Pearland, TX) is a small, grassroots organization formed to protect the interests of property owners in regard to government regulations. UPOA seeks to gain fair compensation for privately-owned property in the extreme cases where government must exact private holdings.

Virginians for Property Rights (Warrenton, VA) serves as an umbrella organization for grassroots property rights group throughout Virginia. VPR's goal is to educate, serve, and develo groups of citizens in every community to ensure that governmer

officials adhere to the protections of private property guaranteed in the Constitution.

The **Western Mining Council, Inc.** (Reno, NV) was formed 50 years ago to protect the property interests and constitutional rights of the small business miner. Many in its membership of have been robbed of their livelihoods and a lifetime of investment by excess regulation and overreaching government -- all in violation of the Constitution. These members strongly support the reversal of the trend of government to take private property without just compensation, whatever the circumstances.

The **Whitestone Southeast Logging Company** (Hoonah, AK) is a high-lead, cable logging company that has been in business since 1963. It employs over 250 workers who log on both public and private land. In the past, Whitestone Southeast was forced to forfeit large portions of prime timber land they had purchased due to a law enacted after their transaction. Their ability to challenge the constitutionality of the law was thwarted by lack of money to continue the suit.

STATEMENT OF THE CASE

This case squarely presents the issue of whether a city may take fee title to private property without paying for it pursuant to a plan

determined in advance to acquire a connected series of privately-owned parcels of property, for the benefit of society as a whole.

Unlike the *Lucas v. South Carolina Coastal Council*, 505 U.S. ____, 112 S. Ct. 2886 (1992), case, this is not a regulatory taking case in which the property owner complains that the city of Tigard has deprived her of all of the beneficial and productive uses of her property due to the operation of a regulatory permitting scheme. In this case, the city has flatly demanded fee title to approximately ten percent of Mrs. Dolan's land in exchange for granting her permission to use her land.

The city has attempted to justify the taking of Mrs. Dolan's property without just compensation on two grounds. First, the city asserts that the required dedication of private property is to address the problems of increased water runoff and increased traffic caused by the enlarged plumbing and electrical supply store. Yet, the court below made no finding as to the proportion of bicyclists and runoff that the Petitioner's expanded store would create.

Second, in response to the argument that the city's taking effected a physical occupation of the Petitioner's land, the court below described the dedication of ten percent of Florence Dolan's property as "voluntary." Viewing the city's demands as "voluntary" is, of course, simply an attempt to camouflage what is in reality an "out and out plan of extortion." *Nollan v. California Coastal Commission*, 483

U.S. 825 , 837 (1987). Only in the never-never land of legal fiction could the city of Tigard's demand for Florence Dolan's property in exchange for a building permit be considered "voluntary." Indeed, "voluntary," as it is commonly understood, connotes a situation in which the act of giving is "[u]nconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself" and as an act which is "[p]roceeding from the free and unrestrained will of the person; resulting from free choice without compulsion." *Black's Law Dictionary* 1575 (6th ed., West, 1990).

In the unvarnished world of reality, the city of Tigard purposefully and deliberately set upon a course of achieving what it deemed an important social objective by using the muscle of the city's zoning authority to extract the necessary property from its owners. Specifically, this city determined that it would be in the public interest to construct a municipally-owned pedestrian/bicycle path and streamside greenway. So, the city's planners drew up designs which were formally adopted into the comprehensive plan.

The city then adopted an ordinance which on its face contains the following extortion scheme:

"The City shall review each development request adjacent to areas proposed for pedestrian/bike pathways to . . . require the necessary easement or dedications for the pedestrian/bicycle pathways." (City of Tigard, Comprehensive Plan, Section 8.4, Pet. App. J-2). Describing

the land to be dedicated as "the backbone on the open space system," (*id.*) the streamside greenway was to be acquired through the "dedication of all undeveloped land within the 100-year flood plain plus sufficient open land for greenway purposes specifically identified for recreation within the plan." (*id.*).

The following are set forth as explicit approval standards for "site development review:"

> Where . . . development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle plan.
>
> (City of Tigard Community Development Code, 18.120.180, Pet. App. K-1).

Notably, the city's plans contained no references whatsoever for the purchase of any of the desired property or compensation for any of the owners.

If Justice Oliver Wendell Holmes were alive today, he could point to his prescient warning of over 70 years ago that government could easily overwhelm the individual and the Constitution in its zeal to do what it perceived as public good:

"[W]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

The city of Tigard's scheme of extorting land from individual property owners as a price for being able to make any significant modifications to their property -- despite the lack of a substantial relationship between the demand and the proposed new use -- is the modern embodiment of Justice Holmes' concerns.

SUMMARY OF ARGUMENT

The facts of this case amply demonstrate that the city deliberately set about acquiring fee title to private property through an exaction scheme which provided for no compensation to the owners. Accordingly, this case falls directly within the prohibition against the taking of private property for public use without just compensation contained in the Fifth Amendment of the Constitution. The just compensation clause of the Fifth Amendment is not ambiguous. Containing the only express money damages provision in the Constitution, the clause demands that money be paid to an owner of private property whenever that property is taken for public use.

The city of Tigard does not deny that its requirement for Mrs. Dolan to dedicate approximately ten percent of her property in exchange for its approving her building permit application will result in the city's having full title to the land taken. Nor is there any dispute that the city is taking the land for public use. Nor is there any valid

justification for the taking, other than vague suggestions that the easement taken will be used to address problems of storm water runoff and increased traffic caused by the larger building.

However, the lack of proportionality between the city's required dedication of property and the problems the taking purported to address, in itself renders the taking patently unconstitutional. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) *accord United States v. James Daniel Good Real Property*, 1993 U.S. LEXIS 7941; 62 U.S.L.W. 4013 (Dec. 13, 1993) (seizure of private property not justified by the needs of the government when compared to the importance of the private interests at risk).

As this Court recently affirmed in *United States v. James Daniel Good Real Property, supra*, constitutional protection of private property rights is essential because "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 1193 U.S. LEXIS at 13. Upholding schemes which extort private property from its owners as a price of exercising their constitutional right to use private property in a reasonable manner violates not only the express guarantee of the just compensation clause, but eviscerates the framers' purpose in securing the protection of private property in the Constitution. *See* Story, J., *Commentary on the Constitution of the United States*, para. 1790 (1833) ("[I]n a free government, almost all other rights would become

worthless if the government possessed an uncontrollable power over the private fortune of every citizen.") Thus, a reversal of the decision of the court below is crucial to ensure that the protections to private property guaranteed by the Constitution be realized.

ARGUMENT

I. The Fifth Amendment Requires Just Compensation In Every Case Where Private Property Is Taken For Public Use.

This is not a regulatory taking case in which the property owner complains that a regulatory scheme "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393/415. Accordingly, it is inappropriate to apply either the "*per se*" rule of *Lucas v. South Carolina Coastal Council*, 505 U.S. ____, 112 S. CT 2886 (1992) or the *ad hoc* approach of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In this case, the government demands fee title from the Petitioner. This circumstance falls squarely within the Fifth Amendment's prohibition: "[N]or shall private property be taken for public use, without just compensation."
U.S.CONST. amend. V; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980)(applying the just compensation clause to the states via Section 1 of the Fourteenth Amendment).

The Fifth Amendment contains no limitations or exceptions for its guarantee and a state (or its political subdivision) may not refuse such compensation where a taking has occurred. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 316, n. 9. (1987). The obligation for just compensation simply attaches whenever government action works a taking of private property rights. *Armstrong v. United States,* 364 U.S. 40, 49 (1960). This constitutional obligation is so evident that this Court has held that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy to which he is entitled if private property is taken. *First English,* 482 U.S. at 304; *United States v. Clarke,* 445 U.S. 253, 257 (1980).

In *Jacobs v. United States,* 290 U.S. 13 (1933), this Court rejected the state's position that it could legislatively limit one's constitutional right to just compensation:

> [The lower court's] ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of eminent domain. That right was guaranteed by the Constitution. . . . The form of the remedy did not qualify the right. It rested on the Fifth Amendment. Statutory recognition was not necessary. . . . The suits were. . . founded upon the Constitution of the United States. The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, 'and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.' The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full

> equivalent of that value paid contemporaneously with the taking.'

Id. at 16-17 (citations omitted).

This guarantee of just compensation applies whether property is taken through the traditional process of eminent domain or through non-judicial means. In *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), the owner of a pond converted it into a marina and, in the course of the construction, connected it to a bay. As a result, the public acquired access to what had once been the owner's private pond. The government asserted jurisdiction over the pond on the grounds that it had become a navigable water of the United States, available for public use. This Court disagreed; that is, if the pond was to become public, then the owner must be paid just compensation:

> [T]he Government must condemn and pay before it takes over the management of the land-owner's property. In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of Petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. [citations omitted] And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.

Id. at 179-80. *See also United States v. Dow,* 357 U.S. 17 (1958) (government required to pay for easement taken as a result of the government's laying pipeline over private property).

Here, the city of Tigard determined to construct a bicycle path and maintain a greenway across a number of privately-owned parcels -- including the Petitioner's property. Ordinarily, a government agency wishing to acquire property for such public purposes would attempt to acquire the property voluntarily at an agreed-upon price or, if agreement could not be reached, to exercise the sovereign right of eminent domain to condemn the property. In either case, the government would receive title to the property, and the property owner would receive the just compensation guaranteed by the Constitution. *First English, supra; see also United States v. Miller,* 317 U.S. 369, 373 (1943)(just compensation means the full and perfect equivalent in money of the property taken and the owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken).

II. A Regulatory Permitting Scheme May Not Be Used to Extort Private Property Without Just Compensation.

The court below found that the title demanded of the Petitioner was not a compensable taking because the dedication was required in exchange for a building permit which the Petitioner sought. Indeed, the court below went so far as to assert that some of the bicyclists would use the bicycle path to visit the Petitioner's plumbing store and that some of the stormwater runoff accommodated by the greenway

would come from the Petitioner's parking lot. The court below stopped short of saying, however, that the bicycle path and greenway were necessitated by the Petitioner's hardware store, and made no finding as to proportion of bicyclists and runoff that the Petitioner's expanded store would create.

The just compensation mandate of the Fifth Amendment was intended to prevent government from "forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). In the absence of a finding that the Petitioner's hardware store contributes substantially to bicycle traffic and runoff, the exaction of private property without just compensation cannot be constitutionally sustained.

The facts in this case demonstrate that the concept of a bicycle path and greenway came first. The city's ordinances, see Pet. App. J-1, 2., were not tailored to address municipal burdens created by the Petitioner's plumbing store expansion, but as a transparent means of obtaining the right of way without paying for it. Had the Petitioner's property not been located along the route of the bicycle path and greenway, she might have obtained the permit to construct the identical expansion of her store without extraction of title to any of her property, even though the store might have been visited by an

identical number of bicyclists and created the same amount of storm water runoff.

In short, this is not a case in which a developer of a housing project is required to install roads, sewer, water, and electrical utilities to service the houses he plans to build. The principle purpose of requiring the Petitioner to dedicate private property to the city is to benefit the city and not the Petitioner's own property. The fact that the dedication is made a "condition" of permit issuance does not obscure the city's scheme: to obtain title to the right of way without paying for it.

The city's true intent is further illustrated by supposing that the Petitioner withdrew her permit application and decided not to expand. In that case, she would not be required to dedicate the needed right of way to the city, leaving the city of Tigard with a bicycle path which lacked an essential link across the Petitioner's land. To complete the bicycle path, the city would be thus be required to condemn the land and pay for it. The accident of the Petitioner's permit application is extraneous to the city's need for her land, without which the entire bicycle path and greenway are useless.

To create this pathway may be a good idea, but "that does not establish that [Petitioner] (and other [owner's of property along the bicycle path and along the greenway]) alone can be compelled to contribute to its realization." *Nollan*, 483 U.S. at 841.

III. Required Dedications Are Not "Voluntary," But a Taking Without Just Compensation.

Relying on *Yee v. City of Escondido*, 503 U.S. ____, 112 S. Ct. 1522 (1992), the court below found the required dedication of the Petitioner's property to be "voluntary" and thus not an unconstitutional taking. First, the simple response is that if the Petitioner wished to voluntarily donate her land to the city, the matter would not be before this Court. The term "voluntary" refers to a situation in which the act of giving is "[u]nconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself" and as an act which is "[p]roceeding from the free and unrestrained will of the person; resulting from free choice without compulsion." *Black's Law Dictionary* 1575 (6th ed., West, 1990).

This Court's decision in *Yee* is in apposite. In that case, this Court found that the owner of a mobile home park had voluntarily opened his property to the public and, therefore, could not contend that rent control regulations relating to mobile home parks being required to admit the public to his mobile home park constituted a taking of the right to exclude that public. *Yee* does not stand for the proposition that having opened one's property to the public justifies demanding dedications of that property for purposes unrelated to the use of the property. Had the town of Escondido demanded of the Yee's that they dedicate a bicycle path and greenway across their mobile home

park, the justification for the taking would not have existed; otherwise, a single public use (*e.g.*, a mobile home park or a plumbing store) would justify demands of dedications for highways, railroad crossings, transit corridors, airport runways, and every other manner of public use.

The extraction of private property as a condition of using one's property[1] may not be said to be "voluntary." The ownership of property includes the right to make reasonable use of it; to condition the exercise of this right on dedication of a portion of the property is to eviscerate the right to use the property itself. Such a constitutional right may not be so conditioned. *See Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982) (Marshall, J.) ("[T]he government does not have unlimited power to redefine property rights."). Forcing the property owner to choose between not using his or her property at all or giving a portion of it to the city as condition of using the remainder is a Hobson's choice in which voluntariness plays no part.")

[1] Property rights protected by the Constitution have been described by this Court as the rights "to possess, use and dispose" of the property. *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. at 435 and *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

CONCLUSION

For the forgoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certioari To
The Oregon Supreme Court

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE ALLIANCE FOR AMERICA, AND THE FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF FLORENCE DOLAN

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BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE ALLIANCE FOR AMERICA, AND THE FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF FLORENCE DOLAN

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amici curiae* in support of Florence Dolan.[1]

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation (MSLF) is a nonprofit, public interest law foundation organized pursuant

[1] *Amici* have obtained the written consents of the parties. These written consents have been provided to the Clerk of the Court.

to the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, a limited and accountable government, and the free enterprise system.

The Alliance for America is a fifty state network of nearly five hundred independent grassroots organizations whose collective membership numbers in the millions. These groups represent a variety of vocational, cultural, and political interests including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, private property protection, local government and various community and regional organizations. The Alliance was formed in 1991, and is intent on curbing excessive governmental regulation and the violation of constitutionally-protected property rights resulting in family and community despair.

The Fairness to Land Owners Committee (FLOC) is a Maryland-based, national organization with over 13,000 members who are property owners faced with confiscatory land-use regulations involving a number of federal and state statutes. FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's own land, and is active in educating the public and lawmakers about the difference between conservation and confiscation.

Amici's interests in the outcome of this lawsuit are directly tied to their members' private property rights. *Amici* believe that the ruling of the Oregon Supreme Court does violence to the precedent decisions of this

Court which recognize the constitutional vitality of private property rights.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amici curiae hereby adopt Petitioner's statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case.

SUMMARY OF THE ARGUMENT

Amici acknowledge that Petitioner does not challenge Respondent's land use regulations generally. Petitioner does, however, challenge the exactions demanded of her by Respondent as a condition to receiving a development permit for her property.

The Oregon Supreme Court erred in dismissing Petitioner's claims under the Fifth and Fourteenth Amendments to the United States Constitution for the taking of her property and the violation of her due process rights. Further, the decision of the Oregon Supreme Court is in direct conflict with decisions of this Court with respect to three important federal questions concerning the extent to which persons acting under color of law may interfere with, impair, or take property rights.

This Court should not allow Respondent, and other governmental bodies, to avoid their mandatory duty to compensate landowners whose property is put to public use. Indeed, it is only of recent vintage (and in the face of

dwindling public fiscs) that governmental bodies have sought, in the name of environmental protection, to circumvent their eminent domain powers without regard to the property owners' Fifth Amendment rights, and take an individual's property via confiscatory actions, such as the action present in this case.

ARGUMENT

A. The Character Of The Governmental Action In This Case Is Confiscatory In Nature Because It Ousts An Owner From Her Property In A Way Customarily Achieved Through Eminent Domain Proceedings.

This Court has established, as a basic tenet of land use jurisprudence, that certain rights are fundamental to the concept of private property. Among those fundamental rights are the right to absolute and exclusive ownership and possession of property, and the right to evidence such exclusive ownership and possession by excluding others from one's property. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). To the extent that government agencies or persons acting under color of law deprive a property owner of the right to exclude others, this Court has declared such acts to be a deprivation of those fundamental rights and a taking of a property interest under the Fifth and Fourteenth Amendments to the United States Constitution, irrespective of the extent of the occupation or the identity of the interloper. *Id.*

Contrary to the clear and unambiguous decisions of this Court, the Oregon Supreme Court has determined that, by simply applying for a development permit and

by seeking the "benefit" of the permit process, Petitioner has, as a matter of law, waived her constitutionally-protected property rights. Moreover, in its decision, the Oregon Supreme Court established, as a rule of law, that a land use regulation which requires a property owner to submit to the continued physical occupation of his or her property, as a condition to obtaining a land use permit, does not result in the taking of the owner's property or the deprivation of the owner's fundamental right to absolute and exclusive ownership and possession of the property. The decision of the Oregon Supreme Court does such violence to settled law, as expressed in the precedent decisions of this Court, that it must be reversed.

1. The Act Of Applying For A Land Use Permit Does Not, In And Of Itself, Require Petitioner To Surrender To Respondent Her Constitutionally-Protected Right To Exclude Others From Her Property.

According to the hypothesis advanced by the Oregon Supreme Court, property owners must be prepared to surrender their property rights for the privilege of seeking a land use permit. As the Orego Supreme Court held: "Petitioners may avoid physical occupation of their land by withdrawing their application for a development permit." Petitioner's App. A-11 n.8.

Contrary to the holding of the Oregon Supreme Court, this Court has ruled that the submission of a permit application does not, as a matter of law, constitute a waiver, by the property owner, of her important and

fundamental property rights. The "voluntary relinquishment" theory advocated by Respondent, and upon which the Oregon Supreme Court erroneously based its decision, was rejected by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In response to Teleprompter's suggestion that the law requiring residential landlords to submit to cable installations was "simply a permissible regulation of the use of real property," *id.* at 438, this Court held that the right of a property owner to make otherwise-lawfully use of his or her property "may not be conditioned on his forfeiting the right to compensation for a physical occupation. . . . The right of a property owner to exclude a stranger's physical occupation of his land may not be so easily manipulated." *Loretto*, 458 U.S. at 439 n.17.

The Oregon Supreme Court advances what might be characterized as an "additive" theory of land use regulation, that is, that government "adds to" property rights by granting permits to property owners for development of their property. However, the proposition that an applicant for a land use permit is seeking a "benefit" from the government, and that, as a condition of conferring such a benefit, the government can thus exact from the applicant any concession which the government deems to be in the public interest, was expressly rejected by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). In *Nollan*, this Court stated:

> [T]he right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as [a] voluntary "exchange."

Nollan, 483 U.S. at 833 n.2.

In ruling as it did, the Oregon Supreme Court undertook an extensive analysis of this Court's decision in *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992). However, *Yee* is clearly distinguishable and further, is not applicable to the facts of this case.[2] This Court, in reaching the conclusions which distinguish *Yee* from *Loretto* and *Nollan*, relied upon the fact that, by engaging in the mobile home rental business, the Yees were presumed to have voluntarily submitted themselves to the reasonable regulation of the mobile home rental business, including the rent control provisions of the Mobile Home Residency Law. However, in so ruling, this Court observed that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner, over objection, to rent his property or to refrain in perpetuity from terminating a tenancy." *Yee*, 112 S.Ct. at 1528. That is the instant case. Yet, the Oregon Supreme Court has adopted

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[2] The Oregon Supreme Court declined to distinguish the facts of this case from *Loretto* and *Nollan*, and chose instead to base its analysis on *Yee v. City of Escondido*. *Yee*, however, is readily distinguishable from this case on its facts; the Yees *chose* to engage in the mobile home park rental business and, therefore, became subject to the reasonable regulation of that business by the City of Escondido. Petitioner has no more elected to engage in the pedestrian and bicycle recreational business than Mrs. Loretto was in the television business, or the Nollans were in the business of providing accommodations to beach walkers.

a construction of *Yee* that deprives all meaning and vitality from this Court's *Loretto* decision governing *per se* takings for permanent physical occupations of private property.

Amici acknowledge the authority of Respondent to regulate the use and development of Petitioner's property under the provisions of state and local land use laws. However, Respondent and the Oregon Supreme Court "go too far" when they allow the taking of Petitioner's fundamental property rights in the guise of a land use permitting scheme. This Court cannot let stand a decision by a state supreme court which grants to permitting authorities a license to demand the surrender of fundamental property rights whenever the property owner has the misfortune to fall within the jurisdiction of the multitude of federal, state and local permitting programs.

The conflict between the decision of the Oregon Supreme Court and the clear statements of constitutional law expressed by the decisions of this Court, underscores the need for this Court to restate and to clarify the protection which it has previously afforded to the fundamental rights of property owners in the land use permitting process. If the decision of the Oregon Supreme Court is allowed to stand, there may as well appear over the doorways of the offices of zoning administrators and land use regulators throughout the country:

Lasciate ogni speranza, voi ch' entrate[3]

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[3] "All hope abandon, ye who enter in." Dante: *The Divine Comedy, "Inferno"* III. ix.

2. Respondent's Deprivation Of Petitioner's Right To Exclude Others From Petitioner's Property Is A Taking By Respondent Of Petitioner's Fundamental Property Rights And Gives Rise To Both A Substantive Due Process Claim And A Taking Claim Under The Fifth And Fourteenth Amendments Of The Constitution.

The decision of the Oregon Supreme Court is in direct conflict with the recent decisions of this Court. This Court's decisions confirm that the right to exclude others from one's property is a right so fundamental to our notion of private property that any interference with that right by government, or by persons acting under color of state law, is a taking, regardless of the degree of the interference, the economic effect of the interference, the extent of other rights retained by the property owner, or the benefits which might be derived by the public as a result of such interference.

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court held that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation." *Id.* at 179-80. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court emphasized that "when the 'character of the governmental action' is a permanent physical occupation of property, our cases have uniformly found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35 (footnote and citation omitted).

Although in *Loretto*, this Court recognized the "broad power [of the States] to regulate housing conditions in general and the landlord-tenant relationship in particular," *Loretto*, 458 U.S. at 440, the Court also recognized the distinction between rent control cases (such as *Yee*) and physical occupation cases. "In none of [the housing regulation] cases however, did the government *authorize the permanent occupation of the landlord's property by a third party.*" *Id.* at 440 (emphasis added).

Equally compelling and even more relevant to Petitioner's position is *Nollan*, in which this Court stated:

> [t]he right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property." In *Loretto* we observed that where governmental action results in "[a] permanent physical occupation" of the property by the government, itself or by others, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises. (Citations omitted.)

Nollan, 483 U.S. at 831-32.

This Court, in *Nollan*, reaffirmed its rationale in *Loretto* by stating "our cases universally have found a

taking to the extent of the occupation, *without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.*" *Nollan*, 483 U.S. at 831-32 (quoting *Loretto*, 458 U.S. at 434-35) (emphasis added). One need only compare the limited extent of the "physical invasions" held to be a sufficiently intrusive infringement upon the fundamental rights of the property owners in *Loretto* and *Nollan* with the forced occupation of a significant part of Petitioner's property by the City's bicycle and pedestrian pathway, to conclude that a significantly greater invasion of Petitioner's property has occurred than the Court found to be constitutionally offensive in *Loretto* and *Nollan*.[4]

In this case, the Oregon Supreme Court has decided an important federal question of fundamental property rights in clear conflict with the applicable decisions of this Court.[5] *Amici* strongly believe that it is important,

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[4] The right to exclude "others" from one's property is not limited to television cable or beach walkers. In *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), the Court of Appeals for the Ninth Circuit found that it was constitutionally permissible to prevent the plaintiffs from shooting endangered grizzly bears which had been killing plaintiffs' sheep. *Id.* at 1331. Nevertheless, the Court recognized that regulations were within constitutional limits because they "do not forbid plaintiffs from personally defending their property by means other than killing grizzly bears." *Id.*, including the fencing of the property to exclude the bears. Justice White, in his dissent to the Court's denial of *certiorari* in *Christy v. Lujan*, 490 U.S. 1114 (1989), observed that "perhaps a government edict barring one from resisting the loss of his property is the constitutional equivalent of an edict taking such property in the first place." 490 U.S. at 1115.

[5] The Oregon Supreme Court held that the exactions were permissible based upon a "reasonable" nexus theory and not

both to protect the rights of Petitioner and to secure the fundamental rights of all property owners from unwarranted incursions by government regulatory agencies, that this Court settle the questions raised by Petitioner. This Court's decisions in *Loretto* and *Nollan* clearly establish that it is the *fact* of the forced permanent physical invasion, not the *degree* of the invasion or the identity of the interlopers which is the determining factor. The decision of the Oregon Supreme Court is inconsistent and irreconcilable with the principles of fundamental property rights established by this Court in *Loretto* and *Nollan*. If allowed to stand, the decision of the Oregon Supreme Court will cast tremendous doubt upon the soundness of this Court's decisions.

B. The Transfer Of Rights In Petitioner's Property Does Not Substantially Advance A Legitimate Governmental Interest And Thus Constitutes A Taking.

A statute takes property if it does not *substantially* advance legitimate state interests. *Nollan*, 483 U.S. 825, 834 n.3 (1987). *Nollan* held that California's imposition of an easement upon the Nollan's property had little connection with the justifications advanced for the exaction. Without adequate ends and means, this Court reasoned, the purpose became "quite simply, the obtaining of an easement . . . but without payment of compensation." *Id.* at 837.

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this Court's "substantial" nexus requirement. The Oregon Supreme Court stated that the Respondent's findings justified the greenway exaction by determining that additional storm water runoff, resulting not only from Petitioner's development, but also from "elsewhere within the Fanno Creek drainage basin, is *expected* to increase flow within the creek." The findings also purportedly justified the pedestrian and bicycle pathway dedications because they were "*reasonably related* to the applicant's request to intensify development of this site" because it was "*reasonable to assume* that customers and employees of the future uses of this property *could* utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." Petitioner's App. A-24.

Amici believe that this case strongly illustrates the dangers of allowing lower courts to relax the constitutionally required standard governing the degree of scrutiny in takings and exactions cases. The Oregon Supreme Court's decision unconstitutionally permits cities to extort public improvements, planned and codified in master plans, by exacting those improvements from landowners who seek to develop their properties, merely because their properties are in proximity to the sites planned for improvement. This amounts to nothing less than calculated extortion.[6]

In *Nollan*, this Court stressed that the nexus requirement is more stringent than its counterpart under the

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[6] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (the question "at bottom" in a takings case is "upon whom the loss of the changes desired should fall"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (takings clause is "designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole," (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987) (the government cannot "single [] out 'individuals' to bear the burden of [its] attempt to remedy" public problems).

Equal Protection Clause. *Id.* at 835 n.3. More is required than a plausible reason:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination . . . [o]ur cases describe the condition for abridgment of property rights through the police power as to a "*substantial* advanc[ing]" of a legitimate state interest.

Id. at 841 (emphasis in original). Measured by these standards, Respondent's permit exaction cannot pass constitutional muster.[7] Evidence of an exaction substantially furthering a legitimate governmental interest must be reasonable in nature, credible, and of solid value. As dissenting Oregon Supreme Court Justice Peterson suggested, "[i]f in fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely why the need in fact exists is a modest burden to place on the government." Pet. App. at 29.

Further, Justice Peterson, in his dissenting opinion, described the inadequacy of Respondent's findings. As an example, Justice Peterson described the justification of the dedication for the greenway and storm drainage: "[A]ll these findings establish is that there will be some

[7] The insistence upon a nexus between the end sought and the means used is a variant of the harms test. Not having caused the harm, Mrs. Dolan is now asked to underwrite alleged problems which are not a consequence of her conduct. *See Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

increase in the amount of storm water runoff from the site. A thimbleful? The Constitution requires more than that." (Peterson, J., dissenting). Petitioner's App. A-26. Given the undisputed fact that Respondent prepared no site specific studies to substantiate its findings, the Oregon Supreme Court is simply licensing extortionate behavior which enables Respondent to obtain its true public goals: (1) obtaining a greenway to further the objectives of the *Master Drainage Plan* and; (2) to provide for the physical relocation and expansion of the Fanno Creek channel to accommodate stormwater runoff from other additional development projects in the drainage basin.

The argument propounded by the City of Tigard, in support of its case, amounts to an assertion that the courts are obligated to accept any proffered justification of a statute at face value, no matter how tenuous its logic or dubious its assumptions.[8] If that were the law, there would be no point in pretending to have a constitutional protection against irrational and arbitrary laws, for there

[8] As Jeremy Bentham put it:

> In a state of things like this, what could be more natural than that, by a people infants as yet in reason, giants in passion, every distinguishable feature of a system of procedure directed to such ends should be condemned in the lump, should be dissolved in one undistinguishable mass of odium and abhorrence; more especially any particular instrument or feature, from which the system was seen to operate with a particular degree of efficiency towards such abominable ends. . . .

The Works of Jeremy Bentham, ed. John Bowring (Edinburgh, 1843), VII, 456.

is no possible enactment that cannot be *somehow* argued to support some legitimate purpose, if the logic of that argument is deemed to be entirely immune from any judicial scrutiny. *Amici* urge this Court to require government to make specific findings that substantially and proportionately support, in both character and degree, any exactions imposed as a result of adverse impacts created by the use of private property. The Constitution requires no less.

In short, whereas the California Coastal Commission in *Nollan* was properly characterized by this Court as engaging in an "out-and-out plan of extortion," by demanding that the owners provide a public easement as a condition for rebuilding their home, *Nollan* at 837, the City of Tigard, in this case, has brazenly gone much further and engaged in what could be aptly called an out-and-out plan of confiscation.

C. By Requiring A Significant Area Of Petitioner's Property To Be Left As A Public Open Space And Recreational Area As A Condition Precedent To Permitting The Development Of Any Other Portion Of Petitioner's Property, Respondent Has Denied Petitioner All Productive Or Economic Use Of That Portion Of Her Property, Without Compensation.

While there remains some question as to the economic effect of the development limitations imposed by Respondent on the "other areas" of Petitioner's property, the decision of the Oregon Supreme Court leaves no doubt that, in its view, Petitioner can be compelled by Respondent to dedicate her property to a public purpose

as a condition of development of any other area of Petitioner's property. Accordingly, it would appear, under the reasoning of this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed.2d 798 (1992), that Respondent has, under color of state law, taken all beneficial use of the exacted portion of Petitioner's property.

This Court's pronouncement in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), that " '[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated," *Penn Central*, 438 U.S. 104, 130 (1978), must be reexamined in light of this Court's decision in *Lucas*. There is a compelling need for this Court to determine the extent to which a taking has occurred when government action deprives a property owner of all value of a portion of his or her property.

In *Lucas*, the Court noted that the issue of whether a taking has occurred, with respect to the parcel as a whole or the burdened portion of the parcel, was unsettled and that it was unclear "whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." *Lucas*, 505 U.S. ___, 120 L.Ed.2d at 813 n.7. The Court recognized:

> the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of

> value is to be measured. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court.

Id.

The facts in *Lucas* did not afford this Court an opportunity to address the inconsistencies resulting from this Court's formulation in *Penn Central* because, in *Lucas*, the development restriction which required that the land be left in its natural state applied to the entire property. *Id.* at 4883. In this case, however, Respondent's actions prohibit the development of any portion of the Petitioner's property unless a significant area is dedicated for the City's purpose. Thus, under the Court's decision in *Lucas*, Respondent has accomplished a complete taking of that portion of Petitioner's property. It remains to be answered by this Court whether a taking has occurred when a significant portion of Petitioner's property has been left "without economically beneficial or productive options for its use." *Lucas*, 505 U.S. ___, 120 L.Ed.2d at 814.

The decision of the Oregon Supreme Court, if allowed to stand, will encourage government agencies to view the dedication of open space on private land, by regulation, as an attractive, practical and inexpensive alternative to "the use of the many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitude on private scenic lands preventing development uses, or to acquire such lands altogether." *Lucas*, 505 U.S. ___, 120 L.Ed.2d at 815.

CONCLUSION

Amici respectfully urge this Court to find that the City of Tigard violated the Fifth Amendment to the U.S. Constitution when it exacted Petitioner's private property for public use as a condition of property development. The Constitution requires that a heightened degree of scrutiny be applied to the substance of Respondent's actions in this case.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest legal center committed to defending and strengthening essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. The instant case involves the limits of government power when conditioning the right to use and develop one's property on the surrender of other property to the government without compensation.

Although the question in the case before this Court specifically concerns development "exactions," the issues presented go to fundamental questions about the nature and exercise of government power in a highly regulated, modern state and the rights of individuals faced with such enormous power. The Institute's brief, co-authored with a nationally recognized expert on takings law, addresses the specifics of the instant case while also analyzing the larger issues raised by this particular instance of government power.

The Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

STATEMENT OF THE CASE

The facts of the case have been well stated in the petitioner's principal brief and are summarized here only insofar as is necessary to illuminate the critical legal issues. The petitioner presently owns a 1.67 acre plot in the City of Tigard, on which she operates a 9,700 square foot retail electric and plumbing supply store. Her land borders Fanno Creek. The petitioner's proposed expansion of the store to 17,600 square feet meets all applicable

zoning restrictions. The City of Tigard, however, refuses to issue a permit for the expansion unless she yields to two additional conditions, specifically:

(1) That she dedicate to the City that portion of her land that lies within the 100-year flood plain of Fanno Creek as a greenway, and

(2) That she dedicate a 15 foot strip of land adjacent to the floodplain for the construction of a pedestrian and bicycle pathway, to be paid for by petitioner. The City also wants to hold the land in reserve for a future storm drainage system.

These dedications were demanded pursuant to a 1983 local plan adopted to meet the requirements of Oregon's land use planning statutes, which require dedication of land for open space in order, among other goals to "(a) Conserve and enhance natural or scenic resources; . . . (e) Enhance the value to the public of abutting or neighboring parks, forests, wildlife preserves, nature reservations or sanctuaries or other open space; (f) Enhance recreation opportunities; . . . and (h) Promote orderly urban development." OAR § 660-15-000(5).

The case wound its way through the Oregon legal system. In the Oregon Supreme Court, the petitioner claimed that the City had failed to demonstrate an "essential nexus" between the exactions and some legitimate state objective, as is required under *Nollan v. California Coastal Commission*, 483 U.S. 825, 836 (1987). But that court held that Oregon was only required to establish some "reasonable relationship" between the exactions and some legitimate public purpose. *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993). The Oregon Supreme Court then held that both of the City's exactions met the relevant test for two reasons. First, the expanded

size of the petitioner's store created a larger surface of impervious material that could increase the runoff into Fanno Creek, which justified the dedication of the land contained within the flood plain. Second, the increased commercial use of the site promised an increased use of the bicycle and pedestrian paths within the City, which justified the dedication of land for a foot and bike path. This Court granted certiorari to determine whether these purported justifications for the exactions are permissible under the takings and due process clauses of the Constitution.

SUMMARY OF ARGUMENT

In principle this case is about a single issue: who bears the cost of public improvements? The position urged in this brief is the ancient rule that requires the government to use public funds for public improvements. If Oregon's decision is allowed to stand, then this principle will be honored in the breach and not in the observance. The petitioner in this case is asked to fund a greenway and a bicycle path that provide benefits to the community at large. Her building permit is held hostage to the demands of the City. Yet she cannot choose the party with whom she bargains, for the City has sole authority to block any change in land use that she might make.

A power so vast cannot be exercised with impunity, but must be subject to constraints of fair dealing which allow the petitioner to be taxed only if one of two conditions is satisfied. Either her activities cause harm to the public at large, or she receives some benefit from the exaction in question. In the first case she should be charged only to the extent of the harm caused, and in the

second case her compensation should be reduced by at most the extent of the benefit she received. Yet the City made no determination of harms inflicted by petitioner or benefits conferred on her. Its exactions here represent a raw use of state power.

Nor is the exaction permissible because the petitioner could avoid its sting by foregoing the expansion of her business. That hollow choice is akin in all relevant respect to the choice in the gunman's demand – "Your money or your life." Here Oregon says, "If you want to develop your property in useful and productive ways, then you must surrender part of it to the state for a floodplain and bike path." If this exaction is allowed, then why not one for a post office or an army garrison? No citizen should be forced to knuckle under such a choice. Simple fairness dictates that petitioner should not be subject to burdens and exactions that are wholly unrelated to the burdens and inconveniences that her conduct imposes on others. No one doubts that the public could take land for any public purpose by paying just compensation. Yet conversely, Oregon should not be allowed to use the existence of an admitted public purpose to defeat its obligation to pay just compensation whenever it takes land.

The City will doubtless reply that petitioner has waived her right to compensation under the takings clause by consenting to the exactions in order to obtain the permit, which the state has a right to withhold. The City will say that its greater power to withhold the permit embraces the lesser power to grant the permit subject to conditions and exactions, however onerous. To this argument several responses are appropriate. First, the permit power and the zoning power are not unlimited as

to ends, but like all powers in a constitutional democracy, their use must be justified by showing the essential nexus to legitimate social ends. The building permit and police powers allow the state to regulate land to protect others from harm, but not to become by mere assertion and insinuation an owner of some part of the land.

Second, aggressive use of the state's monopoly power allows the state to undermine the critical compromise implicit in the state's eminent domain power. Under our constitutional regime, the state is allowed to force a taking so as to prevent private parties from holding out in ways that frustrate the assembly of land for useful public projects. But by the same token, the state must pay compensation to demonstrate that the public really believes that the project it undertakes is worth the private sacrifice it imposes. The discipline that the just compensation requirement imposes on public authorities will be lost if the state is allowed to bundle the taking of land with its exercise of the permit power. If this occurs, the individual citizen will be forced to compare the cost of the exaction with its potential gain from getting the permit. That citizen will yield to state power if exactions are allowed whenever that potential gain exceeds the private loss. Lost in the shuffle, however, is the relevant social comparison: will the property be worth more in the hands of the state than in the hands of a private party. The state will not make that comparison because it does not have to pay for what it gets. The citizen will not make that comparison but instead will compare the cost of the exaction with the gains obtainable from getting the permit. A transparent subterfuge will erode the discipline on government action that the constitutional requirement of just compensation imposes.

In *Nollan*, 483 U.S. at 837 (1987), this Court condemned as "an out and out plan of extortion," the crude attempt of the California Coastal Commission to force the Nollans to dedicate to the public a lateral beachfront easement across their property as the price for getting a building permit to replace a run-down cottage with a modern building. The principle of that case applies with equal force here, and should not be dissipated by some facile finding of a "reasonable relationship" between the legitimate ends of government and its use of the permit power. To be sure, this case may differ from *Nollan* in that the exaction may generate some small return benefit to the petitioner. If so, then the proper procedure is to reduce the compensation owing by at most the sum of the benefit conferred on the petitioner. Likewise her proposed expansion of the property may inflict some small harm on the public at large. But if so the remedy is a tax equal to the harm, not an exaction unrelated to its size or severity. Nothing in *Nollan* or in the logic of the eminent domain power authorizes a land grab here or elsewhere under the cloak of the permit power.

ARGUMENT

I. THE TAKINGS CLAUSE ALLOWS THE STATE TO OVERCOME HOLDOUT PROBLEMS WITHOUT ENGAGING IN ACTS OF EXPROPRIATION AGAINST SOME OF ITS CITIZENS

The takings clause of the United States Constitution represents an elegant and enduring compromise between the twin demands of individual autonomy and public control. On the one hand, the autonomy principle says that no person should ever be required to part with his

labor or property without his consent. *See* J. Locke, Second Treatise of Government § 137 (1690) ("The *supreme power cannot take* from any man any part of his *property* without his consent; for the preservation of property being the end of government; . . . [F]or I have truly no *property* in that, which another can by right take from me, when he pleases, against my consent. . . . "). Individual consent thus acts as a barrier to both private and government oppression for no one will surrender valuable property unless he receives a fair equivalent in exchange.

The absolute right of any owner to hold or surrender property at will, however, sometimes leads to undesirable social consequences. Thus suppose that the government needs to acquire land to build a highway or a bike path that runs across the lands of many individuals; assume further that the value of the path far exceeds its private cost. In principle, a system of voluntary land acquisition that relied solely on consent should be able to assemble the needed land for the community project. But the strategic behavior of individuals – the bargaining, bluffing and blustering – can frustrate a goal that all desire separately, but are unable to achieve collectively by voluntary means alone. So long as the autonomy principle is given unlimited sway each person can ask for whatever price he or she pleases. The combined demands can be so exorbitant that the individual actions of each party will block the collective solution desired by all. The road which benefits all will just not get built. This holdout problem does not arise when each individual owner is a competitor with every other owner. *See* Cohen, *Holdouts and Free Riders*, 20 J. Legal Stud. 351 (1991). But the holdout power does arise when the cooperation of all is necessary to achieve a common venture.

One way to escape this holdout problem is to run roughshod over the rights of individual property owners. The state, operating by majority vote, could just take the land outright for the highway without paying anyone any compensation. The holdout problem vanishes under the overwhelming weight of state power. Unfortunately, this seductive approach trades in one enormous social problem for another problem even more serious: the difficulties of coordination are overcome at the price of massive expropriation. One might be tempted to say that the ostensible injustice in the case is justified by the greater social good that is obtained, but that argument too depends on knowing that the proposed public improvement is not some mischievous boondoggle, but *really* is worth its total cost. Many projects should never be undertaken, yet no court is in a position to evaluate the gains from building a particular road. A regime that lets the state do what it will spends millions for projects worth thousands.

The need to make public improvements thus appears to place any well-constructed political regime in the midst of an insoluble dilemma. Follow the usual rules of autonomy and consent, and the project can be shipwrecked by the extortionate behavior of individuals seeking to divert the gain from the public project into their private hands. But to ignore consent invites the converse problem of confiscation, which in turn encourages the state to engage in public projects with negative social value. Yet there is a middle path between the horns of this dilemma, and its course is unerringly set by the takings clause of our Constitution. The Constitution consciously deviates from Locke on one critical point that transforms the entire analysis. No longer is the restraint

against government power expressed in terms of individual consent: nor is it expressed in terms of majority will. It is now expressed in terms of just compensation: "nor shall private property be taken for public use, without just compensation." The state is allowed to take the property for public use, but it must pay just compensation. The state may take land for the highway, but it must pay the owner its fair value. The power to compel takings for public use avoids the holdout problem, while the compensation requirement avoids the expropriation problem. Needed public improvements can be funded without placing disproportionate burdens on those individuals who just happen to own the needed land. In this context, it is important to repeat the oft-quoted statement of Justice Black in *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (quoted in *Nollan*, 483 U.S. at 835 n.4): "One of the principal purposes of the Takings Clause is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Requiring just compensation for takings is not without its administrative costs, for someone must value the land prior to the government action. But valuation is a small price to pay to escape the enormous political risks of a policy that requires unanimous consent or one that dispenses with the need for any compensation altogether. Under our constitutional scheme, the price which the individual owner receives is equal to the pre-project market value, so the holdout problem is effectively checked. By the same token the state has no incentive to engage in projects with a negative expected value. The opportunity cost of the land, measured by its best use in private hands, must be paid in cash before the project can go

forward; the costs of these items are put on-budget so that public officials must now ask taxpayers to pay the full cost of the venture. *See Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., dissenting). One single mechanism – paying just compensation – thus gives the state the power to initiate beneficial social changes that could not be obtained if unanimous consent were required, but it does not allow it to crush any single landowner or group of landowners in the process.

II. THE BUILDING PERMIT AND POLICE POWERS OF THE STATE SHOULD NOT BE ALLOWED TO NULLIFY THE BENEFICIAL COMPROMISE BETWEEN STATE POWER AND INDIVIDUAL RIGHTS CREATED BY THE TAKINGS CLAUSE

The above analysis of the scope and purposes of the takings clause presupposes that the government has imposed its will on the individual without his consent. At one level therefore the petitioner's case is quite different because these exactions are imposed only with her consent. The City's argument is that if the petitioner wishes to forgo the construction of her new and larger store, then she need not dedicate any portion of her land to open spaces, storm-drainage or bicycle and pedestrian paths. The City offers her the "bitter" of state exactions only with the "sweet" of land use improvements. The just compensation clause says nothing about consent, but the City argues that it should be interpreted to mean that once the individual consents to an exaction, then no compensation should be required.

The City's argument is profoundly wrong. But it takes a good deal of analysis to see why the presence of

consent does not establish the ultimate legitimacy of government action any more than its absence establishes the ultimate illegitimacy of government action. Before developing the general theory, it is useful to articulate the reasons why the question is so difficult. At one level the question of consent is surely relevant. If the City were to offer to purchase petitioner's entire plot of land, and she accepted the price tendered, then that contract is as good as any other. She could not at some later time insist that the amount that she had agreed to accept was not just compensation for the land taken pursuant to contract. Consent therefore is as important for relationships between the individual and the state as it is for relationships between private individuals.

In many cases, however, the state does not act as an ordinary market participant, but rather as a regulator vested with powers to allow or prohibit all sorts of legitimate private activities. When it operates in this position, its power is not curbed by competition from other potential market participants. Instead, it has a monopoly power that can be abused as well as used.

In this case, for example, the City of Tigard demanded 10 percent of the petitioner's land for storm drainage and bicycle and pedestrian paths. What then is to prevent it from seeking 20 percent or more of the land for the same permits? Or asking a million dollars? Or asking for political contributions or from forbidding religious activities on the remaining land? Nothing in the pure logic of consent makes one bargain any better than the other; and yet one senses that there must be some limits somewhere. The enormous state power should not be used for ends wholly alien to the reasons for having local governments issue permits in the first place: to

prevent activities that are harmful to neighbors or (much more debatably) not in keeping with the overall character and sensibility of the neighborhood.

For these purposes, moreover, it does not matter whether the burden is imposed on a constitutional right to free speech or freedom of religion or to the undisputed exclusive possession of land. All are equally protected under the Constitution.[1] As recently as this term, this Court stressed that "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 505 (1993). And the threats to property are the same as those to religion, speech and political association: the abuse of state monopoly power.

The entire question of monopoly power, and the risks attendant with its use, has long been a major subject of concern in contexts outside of public law. To take perhaps the most familiar example, the ordinary law of real property says that an owner has the absolute right to exclude any person from his premises. Entrance is normally on permission, and there is no requirement that this consent not be unreasonably withheld. In ordinary situations, this set of rules is perfectly adequate because the presence of rival landowners constrain the price that can be charged for entry

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[1] Note that this case does not raise the question of whether various forms of land use regulations are compensable under the takings clause. Rather it assumes that the state would have to pay compensation if it occupied the floodplain and built the pedestrian and bike paths, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984), and then asks whether the state could avoid its obligation to pay by resort to the permit power.

onto land: raise it too high and potential customers will migrate elsewhere unless forbidden from doing so by force.

Yet sometimes situations of necessity arise – situations in which individuals are at immediate peril of life and limb – and here the law has long recognized a privilege to enter land against the will of the owner, so that it is clearly a wrong for the owner to stand his ground and exclude others from the premises. *See Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908). Yet by the same token it is equally clear that the entrant onto the property of another is required to make just compensation. *See Vincent v. Lake Erie Transportation Co.*, 109 Minn. 456, 124 N.W. 221 (1910). Again the principle of necessity has broad and old philosophical foundations. Thus Hugo Grotius wrote, "Now among Theologians also it is a received opinion, that if in urgent distress, anyone shall take from another what is absolutely necessary for the preservation of his own life, it shall not be deemed a theft." H. Grotius, *The Rights of War and Peace*, ch. 2, § VI (1625). However, that right to so take was sharply limited, for this "indulgence must be granted with precautions and restrictions, to prevent it from generating into licentiousness." *Id.* Chief among the restrictions imposed was the payment of just compensation: "the party thus supplying his wants from the property of another, is bound to make restitution, or give an equivalent to the owner, whenever this is possible." *Id.*

Just as the conditions of necessity suspend the ordinary rights of exclusion, so too they suspend the rules of consent. To give only the most famous example, suppose that a well-equipped ship comes on another in distress and offers its assistance only in exchange for an exorbitant sum of money. It is well established as a matter of

maritime law that the owner of the ship in distress can accept the offer, and then repudiate the promise after the rescue has been successfully completed. But again the owner of the rescued ship is not allowed to escape all obligations but must pay just compensation for services rendered:

> Courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit performance of a public duty to be turned into a traffic for profit. The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by the courts for such services.

Post v. Jones, 60 U.S. 150, 160 (1856).

The bottom line is that the consent is again disregarded under conditions of necessity, and just compensation is provided for the services taken, taking into account the magnitude of the risk. *See* Landes & Posner, *Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. Legal Stud. 83 (1978).

These cases raise the identical intellectual puzzle that is presented in the cases of permits with exactions. Viewed in a narrow sense it seems clear that the bargain made between a party in distress and the rescuer works to their mutual benefit in the sense that all things considered, the party in distress would rather pay handsomely in order to survive. Yet from a social point of view something is clearly amiss, given the risks of extortion

and bargaining breakdown that can result from the effort to "take advantage of a situation." Rather than take these risks the law seeks to eliminate the coordination problem that arises in the absence of an orderly competitive market. Yet by the same token it does not simply allow some in need to take what is needed, for fear that an indulgence will "degenerate" into "licentiousness," or the abuse of power will degenerate into out and out extortion. The state monopoly powers are far greater for they arise systematically from the power to exclude all rivals. The petitioner must do business with the City of Tigard whose legal power does not depend on happenstance and does not erode with time. The limits of consent applicable to private disputes carry over to matters of public law where there is again an imperative need to constrain the potential abuses of monopoly power, abuses so great that they cannot be brushed aside even in the presence of explicit consent.

Ironically, the claim of an unfair exaction may also be raised *by* the government when it finds itself in a situation of necessity. In *United States v. Bethlehem Steel*, 315 U.S. 289 (1942), the government sought to set aside shipbuilding contracts which it entered into just after the United States entered World War I. The Court refused to allow the claim of economic duress, but Justice Frankfurter's dissent in the case nonetheless accurately sets out the common law response to the issue.

> It always is for the interest of the party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called. Holmes, J. in *Union Pacific R. Co. v. Public Service Comm'n*, 248 U.S. 67, 70. In that case a state unconstitutionally exacted a fee for a certificate of authority to issue railroad bonds. A

> railroad which had paid the fee and obtained a certificate, rather than run the risk of subsequent invalidation of its bonds and imposition of serious penalties, was held to have been coerced into making the payments. In *Swift Company v. U.S.*, 111 U.S. 22, 29, the taxpayer's only alternatives were "to submit to an illegal exaction or discontinue its business." The payment of the tax in these circumstances was held to be duress. The courts generally regard the dilemma of the taxpayer who must either pay the taxes or incur serious business losses as a species of duress.

Id. 315 U.S. at 326-27 (1942) (some citations omitted). It matters little whether we speak of certificates for railroad operation or permits for new real estate construction. The same peril arises in both settings and both settings call for a determined constitutional response under the Takings Clause.

III. THE UNTRAMMELED EXERCISE OF THE PERMIT POWER BY GOVERNMENT OFFICIALS LEADS TO EXCESSIVE AND ABUSIVE FORMS OF REGULATION, EVEN WHEN THE CONSENT OF PRIVATE LANDOWNERS IS OBTAINED

The dilemmas identified by Justice Frankfurter in *Bethlehem Steel* are applicable in this very case where petitioner can expand her business only if she first obtains the necessary permits from the City. In this case too, the role of individual consent is circumscribed by the exercise of monopoly power. And government entities possess a monopoly power that is never eroded by the passage of necessity or the arrival of some other person willing to provide assistance in time of peril. The government which has the permit power over real estate knows full well that the owner of this property cannot exit the jurisdiction by picking up her land and moving it somewhere else. Nor can

the petitioner shop around for another planning board to do business with if she is unhappy with the service that she receives from the City. There is nothing that says that the size of an exaction is written in stone, and the state may well increase the level of exactions on successful private projects, even if these projects pose no threat to the public at large. Only by tying the level of the exaction to the harm caused by the private project, or the benefit conferred on that project by government action, can these public abuses be curbed. The persistence and the power of government monopoly thus demand great scrutiny over the exercise of government powers, even when consent is obtained. *See* R. Epstein, *Bargaining With the State* (1993).

In order to see how the monopoly power allows government to "take advantage of its situation" it is sufficient to consider two simple numerical examples of how the process works from its onset to its conclusion. Thus suppose that the landowner wishes to expand a current store into a larger and more profitable one. Let us assume that the cost of the expansion is $1,000, and that the anticipated benefits that it will yield to the owner are $3,000. Let us assume further that the improvement is, as was the case here, in full conformity with all general applicable zoning ordinances so that approval would generate to the owner the full $2,000 in gain from the new project. (We assume for the sake of argument that the improvement causes no public harm, and note that if it did, the level of compensation payable should not be reduced to zero, but only to the extent of the harm caused.) What happens to this situation when exactions are imposed? It is instructive to consider two distinct scenarios.

First, assume that the exaction in question will cost something under $2,000, say $500, and that it will generate a public gain in excess of its cost to the landowner,

say $900. Under these circumstances it is clear that if left to a yes-or-no choice, the individual landowner will yield to the demands of the state (which is why exactions hold such terror for property owners). The private gain subject to the exaction is $2,000 minus $500 or $1,500, which is far greater than the zero gain that flows from accepting the status quo. The state exaction thus expropriates one-fourth of the project gain. From a social point of view should the state be allowed to respond with a blunt, so what? After all, the public gain from the exaction is stipulated to be at $900, so that there is a net social gain if both the project goes forward *and* the exaction is allowed. But any supposed aggregate social gain is illusory, for nothing prevents the state from reaching the same desirable outcome by allowing the development to go forward while spending $500 in public funds to purchase the land and any additional public improvements on it. The system of exactions thus creates a very skewed distributional outcome, for the total cost of the public improvement is borne by a private party who is no longer able to keep the gain from her plan to herself. The fairness concerns of *Armstrong v. United States* are squarely raised.

Worse still, the system of exactions will create nonstop political intrigue and high transaction costs in the absence of any limits in setting the terms and conditions of the exactions. In real world settings, the size of the exactions could well be doubled, for example, to $1,000 or even $1,999, but where that happens the property owner is left with the same vice-like choice: either capitulate and obtain a permit or have no profit at all.

A second scenario is even more troublesome. Assume that the exaction will still cost less than $2,000, say, $900, but now will generate a social benefit of less than the last

figure, say $500. At this point the true social evil of the exaction technique becomes apparent. So long as the exaction is allowed without compensation, the state has every incentive to ignore the private losses. It is still $500 better off, but the social situation is now far worse, as the exaction is for a government project with a negative expected value of $400 ($900 is spent on a $500 improvement). Yet by the same token the landowner remains powerless to resist the exaction, for from her point of view going forward subject to the exaction generates a gain of $1,100, while standing pat generates no gain at all. The vice here is that the exaction extracts more from the anticipated gain of the property owner than it provides in social benefits. A legal rule of no compensation gives the state no incentive to halt this imprudent project, and provides no opportunity for the landowner to resist it. Allow the linkage of exactions and permits as part of a single package and the incentives to create an inferior social outcome are inexorable on the public side and inescapable on the private one.

The outcome in this setting, moreover, is wholly different if the state is required to pay compensation for the exactions taken; now the state is forced to compare the public benefits of its project with the private costs that it imposes on others. It will not spend $900 in public funds to undertake a project that is worth only $500. Unbundling the exaction from the approval process thus generates unambiguous social benefits in this second case by generating, as in the basic takings scenario, the right incentives for the state in the evaluation of its social projects. It is possible to imagine other situations, including those in which the size of the exaction is greater than the anticipated private gains that the owner has from a

particular project, so that the project would be abandoned altogether given the stiff price that the government charges.

But these variations do nothing to alter the basic analysis. In each case the relevant social comparison is between the gains to the state from imposing the exaction and the losses to the private party from that same exaction. And that comparison will only be made if the state is required to pay for each exaction it demands, and not conceal valuation behind the veil thrown up by the permit process. Yet the decision to allow uncompensated exactions means that this comparison is *never* made, so that sound social planning is frustrated in most cases and achieved by dumb luck in all others. When permits can be conditioned on the acceptance of exactions, the sole choice that anyone has to face is whether the social benefits of the improvement are greater than the anticipated private benefits (as opposed to costs) obtained from getting the permit, a choice which bears no relationship to overall social improvements. The social evil in *Nollan* itself was that the California Coastal Commission never made the proper comparison between the benefit it derived from the lateral easement and its cost to the owners.

It therefore follows that bundling permits and exactions together create dangerous incentives for public officials to disregard the private costs of public projects. Since the private gain from improvement is hard to determine, there are all sorts of incentives on the state to set the exactions very high, and then to back off slowly thereafter. By the same token there are far too many incentives for private landowners to bluff and to bluster in order to persuade government officials that they will

not go forward unless the size of the exaction is reduced. The entire process generates wrangling and deception, and it doubtless throws a pall over many sensible projects which could and would be undertaken if the exaction threat did not lurk so prominently in the background. A sound system of government regulation of property should not allow the state to initiate these destructive strategic games with its citizens.

IV. BECAUSE THE CITY OF TIGARD AND MANY OTHER LOCAL GOVERNMENTS HAVE STRAYED FROM THE IMPORT OF THIS COURT'S *NOLLAN* DECISION, IT IS IMPERATIVE TO REQUIRE THAT ALL GOVERNMENT EXACTIONS BE GIVEN CAREFUL SCRUTINY

The concerns with the use of government monopoly power are decisive in shaping the law of exactions in the permit process. Where the state is allowed to do more or less as it pleases, it will doubtless make all sorts of grandiose claims as to the worth of its projects. Its activities will chill the process of development as private individuals do not wish to enter a legal environment that is fraught with such uncertainty. In order to cope with this problem it is not necessary to insist that the entire permit process be scrapped (which could lay the public open to the creation of dangerous or obnoxious development processes). State officials can act in a legitimate fashion, for example, when they condition a permit on the ability of the landowner to curb the discharge of dangerous pollutants into public waters or to make provision for solid waste disposal from the site. Nonetheless it is important that the conditions imposed always be tied

to some recognizable evil of the sort that the state is entitled to prevent.

The instant case illustrates the dangers of the unconstrained permit process. Thus if one considers first the question of whether some greenway should be provided, the right question to ask is whether the diminution in private value is greater than the public gain. No court should try to evaluate this directly. But by the same token no court should accept the naked assertions of the City of Tigard that the project is worth doing, so long as the City has the power to make someone else bear the price. The City has every incentive to overstate the public benefits and understate the private costs. In this case the City wanted to take some portion of the land for a bike and pedestrian path near Fanno Creek. Even the City does not have the temerity to argue that leaving that portion of the land in its original undeveloped state constitutes a public nuisance. Nor is her proposed expansion of a country store a nuisance, lest every building in America be deemed wrongful by legislative fiat. And if petitioner's new building were a nuisance, (which it is not), then it would be wholly improper for the City to allow its operation just because it wanted to obtain a floodplain or bike path free of charge. The right response would be to enjoin the expansion of the store as a nuisance, separately condemn outright the land for the bicycle and pedestrian path with public moneys, and then use public money to construct the path.

The City has tried to sidestep these arguments by claiming that the larger store will increase traffic within the overall system. But its claim is patently manufactured for the occasion. The original master plan of Tigard contemplated the development of these bike paths long

before petitioner gave any thought to the expansion of her business. It is a moral certainty that most users of the path will be going by the store and not to it. Nothing in the record even hints that 100 percent of the traffic increase, real or imagined, is traceable to that expansion. Petitioner's larger store is subject to increased real estate taxes, and thus bears in responsible fashion its pro rata share of any increased traffic densities, here and elsewhere in the City. Why should she be required to bear the costs of projects that work for the benefit of the public generally?

The planning board tried to deflect these concerns by also noting that it was "reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian and bicycle pathway adjacent to this development for their transportation and recreational needs." App. G-24. Yet this whole argument is quite beside the point because *everyone* in town has equal access to the public improvement along with the customers and employees. And if anything, it is highly unlikely that anyone could bike away with a large kitchen sink in tow. Why then should the public at large gain dominant access for free while the petitioner pays for an improvement of little or no value to her? Only if the City is required to condemn the land and pay for the improvement itself will the City, or indeed any government, be forced to decide responsibly whether the proposed path, or any other project, is a good or a bad idea.

The second condition – the preservation of the greenway within the 100-year floodplain – raises a variation on the original question: does any additional stormwater runoff justify requiring petitioner's dedication of the floodplain? Once again, one fatal concession undermines the City's entire argument: the City's findings that the

increase in runoff is anticipated not only from the petitioner's development but also from "*elsewhere* in the Fanno Creek drainage basin. . . . " App. G-40 (emphasis added). If so, then the City must disaggregate the increased flow by source. If *all* the water came from sources other than the petitioner, then why make her bear the costs of its containment? Surely if the City needed pipe, asphalt or sealant to secure drainage, it could not force her to pay these costs alone. It would have to purchase these needed supplies with public money. Why then should the City be able to hold up the petitioner's development permit in order to make her neutralize a peril created by others? If others have created the greater flow, then charges could be levied against them given the losses that their private conduct imposes on others. If natural runoff is in issue, then general taxes must fund public responses against the natural hazards to the community.

Perhaps, however, some fraction of the extra flow is attributable to the expansion of the petitioner's store. Increased ground coverage with impervious materials *might* increase the level of saturation in the uncovered land, which in turn *might* increase the runoff into the creek, which *might* require some costly public response. There is in principle no *a priori* way to deal with this aspect of the case, for so much depends on the ratio of runoff that is created by petitioner's expansion relative to the total increase in runoff from all sources. However, general declarations of harm should not be allowed to replace specific forms of proof. At the very least the City should be required to estimate the fraction of the anticipated overflow that is attributable to the on-site changes, and limit its charges accordingly, after giving petitioner

the opportunity to redesign her premises to reduce that risk. The guiding principle is that any exaction must be "cost-justified," that is, it must be tied to the harm caused, and not to the petitioner's anticipated profit from an expanded business. The possibility of some additional public harm cannot be used as a pretext for massive confiscation.

The approach that is advocated in this case is perfectly consistent with the approach that this Court took in *Nollan*. There the suspicion of state abuse led to the requirement that some "essential nexus" be established between the exaction and some legitimate state end. The requirement was no mere "pleading" technique, but depended on a real and substantial showing of potential harm closely related to the exaction that was imposed. If this case turns solely on the close reading of *Nollan*, then it should be apparent that the Oregon Supreme Court has strayed from a sound understanding of the case. As these interpretative matters have been well canvassed in petitioner's brief, it is best here to show why the rule in *Nollan* helps prevent widespread and pervasive forms of local government abuse that were identified above.

In *Nollan* itself, this Court refused to allow the California Coastal Commission to link a permit for building a new beach house to a demand for the dedication of a lateral easement running along the beach. The clear justification for this result is that the easement itself can normally be taken on payment of full value. If the Coastal Commission could hold the landowner hostage under the permit power, then the proper social comparisons would never be made. The landowner would ask whether the easement is worth more to him than his right to develop and given an affirmative answer to that question, he

would submit, no matter how unfair. But the correct social question is whether the easement is worth more to the state than it costs to the owner, and the state will make that comparison only if forced to condemn the easement for cash.

Nollan's commands are not always obeyed by government. In *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260, 277 Cal. Rptr. 371 (1991), the California Coastal Commission was again slapped down when it sought to condition Surfside's right to build a revetment needed to prevent erosion damage on its willingness to dedicate a lateral beachfront easement on its property. The Court of Appeals properly interpreted *Nollan* to preclude any linkage between the sea wall and the lateral easement in the absence of a showing how the building of a wall could cause erosion or other forms of harm to the beach. *Id.* at 1260, Even if the revetment did pose an erosion peril, the proper response is a special assessment sufficient to cover the costs of rectification or damages. The response should *not* be a forced dedication of a lateral easement whose cost to the owner could far exceed the harm inflicted on the public beaches.

Similarly, the Ninth Circuit reached the right result in its pre-*Nollan* decision in *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), cited with approval in *Nollan*. In *Parks*, the Ninth Circuit rebuffed efforts by the City of Klamath Falls, Oregon to condition a building permit for a condominium project on the surrender of title to lands which contained valuable geothermal wells. The value of the wells to the owner, while substantial, was probably far below the anticipated profit from undertaking this extensive project, so that the consent could have been extracted

had the court not intervened to protect the property owner. That judicial intervention was clearly correct because the surrender of ownership of the wells was not related to any conceivable external harm that the development might impose.

Unfortunately, other cases have not been consistent with the general teaching of *Nollan*. In *Pengilly v. Multnomah County*, 810 F. Supp. 1111 (D. Or. 1992), the question before the Court was whether the County could condition its building permit on the dedication of frontage necessary to widen an existing public street fronting the new development. Prior to 1951, Oregon law allowed public streets narrower than 50 feet wide. After that date new streets had to be laid out with a minimum width of 50 feet. The ordinance did not, however, bring established streets up to the new standard, a result that could have been achieved by condemning the necessary frontage. The purpose of the linkage, however, was to get the property owner to contribute the needed land to the City free of charge. The practice was upheld in *Pengilly* chiefly on the ground that the wider road worked some benefit to the property owner in question. While the outcome of dedication without compensation might (although it seems unlikely) be justified on this ground, the court's decision clearly elided over the critical issue because nowhere did it determine whether the benefit, if any, *to* the property owner from the required expansion of the road was equal to the value of the land lost.

A far more egregious practice is illustrated by *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 19 Cal. Rptr. 468 (1993). Here a $280,000 exaction was imposed to fund a public park and another $33,000 exaction to fund an "art in the parks program," without any showing of

external harm to the City or return benefit to the land owner. Here the exaction represents the "out and out form of extortion" unequivocally condemned in *Nollan* and shows as well how the use of the exaction power can pose genuine threats to freedom of speech by forcing property owners to support projects that may well be antithetical to their own political beliefs or artistic tastes.

Finally, special mention must be made of *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), which sustained a large financial exaction imposed on *all* new commercial construction within the City on the ground that these fees were needed to offset the increased demand for housing by the poor who were said to be brought within the City limits by these new projects. The Ninth Circuit prefaced its analysis with the observation that *Nollan* worked no change in the applicable constitutional standards, and then continued with the remark that it was a mistake in exaction cases to require "too close a nexus between the regulation and the interest at stake." *Id.* at 874. With that said, it concocted a causal chain composed of missing links. Initially, it is quite impossible to *posit* a uniform connection between any particular commercial development and any increase in housing needs of the poor. Commercial developments come in all sizes and shapes, and there is no reason for a fancy boutique to function identically with a Walmart, or to have the same effects on residential or business patterns within Sacramento.

Worse still, any commercial development will necessarily have multiple effects, and not just the single one identified in the ostensibly independent planning survey commissioned by the City to buttress its special exactions. Large developments are prized in many towns

because they increase the value of nearby properties, create jobs for a flourishing middle class and offer opportunities for poor people to leave the welfare rolls. They also contribute substantially to the tax rolls through the ordinary real estate taxes for which they have no claim for exemption. Development is linked to prosperity as well as poverty, and should not be charged with some hypothetical cost when it receives no credit for the external benefits it creates. The general assessment, moreover, is not simply a way to finance housing for the poor; it also acts as a barrier to entry against new competition for established buildings. One can easily see this scheme as a transparent ruse whereby established real estate developers place roadblocks in the path of new arrivals. The use of general exactions in *Commercial Builders* falls far short of the close connection needed to insure that the exaction is imposed to compensate for some discrete benefit that it caused.

V. CONCLUSION

The legal issues raised in *Dolan* go far beyond the question of a single bicycle path or floodplain. They relate to the powers that governments can exert over their citizens. If the state can force individual citizens to surrender their land in order to gain permission to develop their land, then a wide train of abuses will surely follow in its wake as governments in their quest to satisfy the demands of the political majority will run roughshod over the rights of any isolated and discrete minority. Certain individuals will be forced to bear the costs of improvements that work to the benefit of the public at large, and unwise projects will be undertaken by governments that are insulated by law from the costs of the

decisions they impose on private owners of property within their borders.

And it is all so unnecessary. So long as the takings are for a valid public purpose, the state can obtain the land by paying for it. Where a proposed private improvement threatens external harms, the party that seeks to make that improvement can be required to pay for the losses that it imposes on others. Where a proposed public exaction provides some benefit to the private party, then the compensation paid can be reduced by the benefit conferred. These rules are not mysterious nor difficult to interpret or enforce. They follow inexorably from the logic of *Nollan* itself. The simple rule for exactions must be this: the state should never be allowed to condition its approval of a private development on the uncompensated surrender of a separate and distinct interest in property which it would have to purchase for cash if the state sought to obtain it in a separate transaction. A system of unsupervised exactions is a mischievous form of extortion that has no place in our constitutional order. The judgment for the City of Tigard should be reversed as the exaction imposed is an out and out form of extortion condemned by this Court's *Nollan* decision.

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In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

BRIEF FOR TERENCE AND TAMARA WELLNER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a governing municipality, as a condition of approvals to develop privately owned real property, can require the dedication of a portion of such property for a public purpose, without just compensation, absent a finding of a substantial relationship evidenced by an essential nexus between the dedication (exaction) and the impacts resulting from development?

2. Whether the Oregon Supreme Court erred in failing to apply heightened scrutiny as required by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987), to Petitioner's claim that the city's permit exactions were a taking in violation of the fifth and fourteenth amendments to the United States Constitution?

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INTEREST OF THE AMICUS CURIAE

Terence and Tamara Wellner are the owners of undeveloped real estate located in Clark County, Washington. The Wellners intend to develop and/or sell their real estate for development purposes.

In 1990, the State of Washington adopted a Growth Management Act, Revised Code of Washington, Chapter 36.70A, requiring counties and cities which are subject to specified growth and population parameters to adopt regulations affecting land use and development.

In compliance with the provisions of the Washington Growth Management Act, Clark County is preparing ordinances which will impose restraints and/or require dedications of land as a condition of development of the Wellner's property. The effect of such ordinances is to require the Wellners to bear the cost and other burdens of public benefits under the Washington Growth Management Act. Hence, the Wellners are keenly interested in the present litigation.

For these reasons, the Wellners submit this brief *amicus curiae* to assist the Court in its resolution of this case. Letters of consent to appear *amicus curiae* have been received from the attorneys for the petitioner and the respondents.

SUMMARY OF ARGUMENT

This case presents a question of the correct standard, under the takings clause of the fifth amendment to the United States Constitution, as applied to the states under

the fourteenth amendment, for determination of the constitutionality of exactions required by governing municipalities as conditions of development approval.

Petitioner, Florence Dolan, applied to the City of Tigard for permits to demolish a 9,700 square foot building and construct a 17,600 square foot building in which to relocate her hardware store. As a condition of approval, the city required Petitioner to dedicate approximately 7,000 square feet, one-tenth of her property, for storm drainage and a pedestrian/bicycle pathway. The city based this condition upon a finding that the dedications were "reasonably related" to the impact from Petitioner's development, but failed to include findings regarding the precise impact.

Petitioner pursued administrative and judicial appeals to the Supreme Court of Oregon, where Petitioner argued "that the city must meet a higher standard than 'reasonable relationship', that there must be an 'essential nexus' or 'substantial relationship,' between the impacts of the development and the dedication requirements; otherwise, imposing exactions as a condition of land use approval is an unconstitutional taking." *Dolan v. City of Tigard*, 854 P.2d 437, 441 (1993). The Oregon Supreme Court held that the "city's unchallenged factual findings support the dedication conditions imposed by the city." *Id.*, at 443.

Amicus curiae, in support of Petitioner, before this Court on writ of certiorari, argue that the "reasonable relationship" test advocated by the City of Tigard is vague and overbroad because it fails to establish the

logical extent and standards for determination of the relationship between exactions and impacts of development. Hence, the "reasonable relationship" standard gives no guidance to city planning staff or private landowners as to the constitutional limits upon regulatory discretion.

The "reasonable relationship" test conflicts with the requirement of this Court in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), that the exaction "substantially advance legitimate state interests." Further, the "reasonable relationship" test fails to provide the "essential nexus" required by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987). Under this Court's holding in *Armstrong v. United States*, the failure to find a nexus between the exaction and the impacts from Petitioner's development has unconstitutionally shifted the cost and burden of public benefits to Petitioner, resulting in a taking of private property for public purpose, without just compensation. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

ARGUMENT

I. THE "REASONABLE RELATION8HIP" TEST ADVOCATED BY CITY OF TIGARD IS VAGUE AND OVERBROAD, PROVIDING NO GUIDANCE TO CITY PLANNING STAFF AND PROPERTY OWNERS AS TO THE CONSTITUTIONAL LIMITS UPON REGULATORY DISCRETION.

In denying Petitioner's request for a variance, the City of Tigard determined that the "dedication and pathway construction are *reasonably related* to the applicant's request to intensify development". City of Tigard Planning Commission Final Order No. 91-09 PC, Pet. App. G-24 (emphasis added). This level of scrutiny was interpreted by city officials to include speculations regarding what is "reasonable to assume" or "reasonable to expect". As stated in the city's Final Order:

> It is *reasonable to assume* that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs.
>
> . . .
>
> The increased impervious surface *would be expected* to increase the amount of storm water runoff from the site to Fanno Creek.

City of Tigard Planning Commission Final Order No. 91-09 PC at 13, 20-21, Pet. App. G-24, G-37 (emphasis added).

The introduction of modifiers which dilute the constitutional standard is a natural result of an ambiguity inherent in the term "reasonable" when used without further definition. If reasonable is intended in the sense

of "rational" or "logical", then the test is overbroad and offers no guidance as to the constitutional limit of regulatory discretion. A logical relationship can be found in any connection which is not self contradictory.

For example, the general increase in vehicular traffic cited in the city's Final Order No. 91-09 PC at 13, Pet. App. G-24, could be alleviated by the construction of a new arterial road, not connected to Petitioner's development, but located within the same traffic grid system. If the constitutional test were satisfied by mere logical relations, the city could impose the cost of this new road upon Petitioner's proposed 17,600 square foot hardware store. Taken further, a general increase in traffic could be used to justify the construction of an airfield so that cross country travellers could fly to their destination rather than drive through the city. These examples, like the city's analysis, stretch the imagination, but fall within the bounds of "logical relation".

Certainly the cost of such excessive mitigations would dwarf the cost of Petitioner's entire development. Yet this is the same line of reasoning adopted in the city's Final Order:

> (T)he proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/ bicycle pathway as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

City of Tigard Planning Commission Final Order No. 91-09 PC at 13, Pet. App. G-24.

If, on the other hand, the term "reasonable" intends the traditional "reasonable man" standard, we are confronted with a test which is unworthy of the task presented. Certainly, we cannot presume that the reasonable man is schooled in the subtleties geo-hydrology and traffic engineering. In fact, the "reasonable city planner" is just as likely to be ignorant of these disciplines. The "reasonable traffic engineer" and "reasonable geo-hydrologist", on the other hand, are well qualified to bring precise calculation to the determination of whether exactions are sufficiently related to impacts.

The vagueness and overbreadth of the "reasonable relation" standard can be cured by an additional requirement that relation must be demonstrated using precise engineering data. Such a standard provides the "essential nexus" articulated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987). Engineering calculations will doubtless include assumptions, but the articulation of assumptions within a formula will allow applicants to review and challenge the conclusions based upon evidence. Cities that wish to rely upon the expertise of their own staff could easily prove their qualifications by including findings consisting of precise engineering calculations. Precise findings are entirely lacking in this case.

Without precise calculation, it is impossible to determine whether the exaction is even remotely related to the impact, let alone whether it accurately responds to the *degree* of impact. Yet to require the dedication of even a

few feet more than necessary for mitigation would constitute no less a taking than the dedication of an entire acre. Certainly a doctrine so central to the Constitution as the protection of private property demands the intervention of those most qualified to calculate the impacts of development and propose a proper mitigation.

II. THE INTRODUCTION OF "REASONABLE RELATIONSHIP" INTO THE TEST FOR REGULATORY TAKINGS CREATES AN AMBIGUITY RESULTING FROM A CONFLICT BETWEEN THAT TERM AND THE REQUIREMENT THAT THE EXACTION "SUBSTANTIALLY ADVANCE" A LEGITIMATE STATE INTEREST.

The test for constitutionality of regulatory takings was articulated by this Court in *Agins*:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests (citation omitted), or denies an owner economically viable use of his land (citations omitted).

Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

Expanding upon this doctrine in *Nollan*, this Court observed that the rule lacks precise formulation:

> Our cases have not elaborated on the standards for determining what constitutes a legitimate state interest or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter.

Nollan, supra at 834.

The formulation advocated by the city would require that the exaction: (i) substantially advance a legitimate state interest, and (ii) "reasonably" relate to the impact from the proposed development. In analyzing this formulation, we are immediately confronted with a curious ambiguity resulting from a conflict between the two requirements.

This conflict is evident in the observation that the "impact from the proposed development" in clause "ii" is merely the converse of the "legitimate state interest" in clause "i". The use of the term "impact" carries with it the implication that some state interest has been impacted. Any state interest can be restated as an impact, and vice versa, merely by adding a negation. The impact of failed traffic systems is merely the converse of the state interest in efficient traffic management. The impact of excess storm water run-off is merely the converse of the state interest in efficient storm water drainage.

It would be difficult to imagine a case in which the exaction is only reasonably related to the failure to satisfy a state interest, yet substantially related to that same state interest. If traffic mitigation (the exaction) is only reasonably related to failed traffic systems (the impact), then it is only reasonably related to the state interest in orderly and efficient traffic flow (i.e. the avoidance of failed systems). If required storm drainage systems (the exaction) are only reasonably related to excess run-off (the impact), then they are only reasonably related to the state interest in efficient storm water management (i.e., the avoidance of excessive run-off).

The Oregon Supreme Court opinion is confusing because it fails to appreciate this relationship between the impact and state interest. In reviewing the history, the court observes:

> Before the Supreme Court's decision in *Nollan*, federal and state courts struggled to identify the precise connection that must exist between the conditions incorporated into a regulation and the governmental interest that the regulation purports to further if the regulation is to be deemed to "substantially advance" that interest.

Dolan v. City of Tigard, 854 P.2d 437, 442 (1993).

If the regulation is to "substantially advance" an interest, then it would seem that the required connection has been identified, or perhaps the Oregon court intends different meanings for "furthering" and "advancing" state interests.

The decision in *Nollan* implicitly recognizes the inherent relationship between state interest and the impact of development, as evident in the requirement of an "essential nexus" if the exaction is to "substantially advance legitimate state interests." As stated by this Court:

> (T)he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the

takings and land-use context, this is not one of them.

Nollan, supra at 837.

III. FAILURE TO FIND A "NEXUS" BETWEEN THE IMPACT AND EXACTION UNCONSTITUTIONALLY SHIFTS THE COST AND BURDEN OF PUBLIC BENEFITS TO PETIT1ONER, A PRIVATE LANDOWNER.

The City of Tigard has required dedication of approximately 10% of the Dolan property based, not upon a nexus between the impact of the development and the required exaction but, rather, upon a stated policy to facilitate the completion of general public improvements. As noted in the city's Final Order:

> (Under Community Development) Code Section 18.86.040 . . . The City may attach conditions to any development within an action area prior to adoption of the design plan to achieve the following objectives:
>
> . . .
>
> b. The development shall facilitate pedestrian/bicycle circulation if the site is located . . . adjacent to a dedicated greenway/open space/park. Specific items to be addressed are as follows:
>
> i. Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bike paths identified in the comprehensive plan.

> . . .
>
> Community Development Code Section 18.120.180.A.8 requires that where landfill and/or development is allowed within or adjacent to the 100-year floodplain, the city shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/bicycle plan.

City of Tigard Planning Commission Final Order No. 91-09 PC, Pet. App. G-17, G-18, G-21, G-22.

It is clear from Community Development Code sections cited in the Final Order that the purpose of the required dedication was to facilitate the completion of the city's plan for a comprehensive program of bicycle circulation. This is a laudable public goal, but there are no findings showing a nexus between this goal and Petitioner's proposed plan of private development. In fact, the Code would require the same exaction even if Petitioner's development resulted in a reduction in the total traffic generated from the site. Application of the Code in this case has resulted in an unconstitutional shift of the cost and burdens of public benefits to Dolan, a private landowner. As noted by this Court in *Nollan*:

> One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the

public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Nollan, supra at 835.

CONCLUSION

The "reasonable relationship" test advocated by the City of Tigard is violates the takings clause of the fifth and fourteenth amendments because it fails to satisfy the requirement of a "substantial relationship" as evidenced by an "essential nexus" between exactions and impacts, based upon precise findings as to the type and degree of impact.

The Oregon Supreme Court erred in applying the "reasonable relationship" test, and not requiring findings of an "essential nexus" between the dedication and the precise impacts of Petitioner's development. Thus, the holding in *Dolan v. City of Tigard*, 854 P.2d 437 (1993), should be reversed.

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CITY OF TIGARD,

Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

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I. STATEMENT OF INTEREST

The Northwest Legal Foundation (NLF) is a non-profit public interest law firm. It is dedicated to protecting constitutional rights associated with the ownership and use of private property. The NLF believes the respondent City of Tigard violated petitioner Dolan's constitutional right to use her property. The NLF submits this brief in support of Dolan.

II. SUMMARY OF ARGUMENT

This case is an example of a municipality abusing its power to regulate the use of land. The Oregon Supreme Court (OSC) misconstrued and misapplied this court's ruling in *Nollen v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), to uphold Tigard's actions. *Dolan v. Tigard*, 854 P.2d 437 (Or. 1993). Tigard imposed conditions upon Dolan without sufficient evidence (1) of impacts to justify denying her project, or (2) that the conditions it imposed will ameliorate the impacts Tigard claims will occur. Tigard wanted the land for recreation.

Tigard singled out Dolan to provide a benefit to the citizens of Tigard without compensating her, merely because she chose to exercise her right to develop her land located near Fanno Creek. This court should apply both the spirit and letter of *Nollan*, as well as the U.S. Constitution, by overturning the OSC.

III. ARGUMENT

A. The exactions are a per se taking

Tigard required Dolan to dedicate a 15' strip of land for a bike/pedestrian path, and another parcel in a flood plain, as a condition for approval of an expansion of an existing plumbing supply store. This will result in a compelled physical occupation, which is a per se taking.

A per se taking occurs when the government compels a landowner to consent to a permanent physical occupation of his land. *Loretto v. Teleprompter Manhattan CATV,* 458 U.S. 419, 434-5, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1983). A permanent physical occupation occurs when individuals are given a right to pass along real property, even though no individual is permitted to permanently station himself upon the premises. *Nollan,* 483 U.S. at 832. A landowner has a right to build, and requiring him to yield property to exercise that right is not a voluntary exchange. *Id.* at 833-4, n. 2.

Here, Tigard is compelling Dolan to dedicate land so persons can pass along what is now her property, along with dedicating additional land in the flood plain for recreational use by the general public. This is equivalent to a permanent physical occupation. It would be a taking if Tigard required the dedications unilaterally and without compensation, regardless of the governmental interest the dedications would advance.

The OSC misconstrued *Yee v. Escondido,* 503 U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), in determining there was no compelled physical occupation. 854 P.2d at 441, n. 8. There was no compelled physical occupation in

Yee where the ordinance regulated mobile home park tenancies, but did not require the leasing of land to mobile home tenants. The tenants were invited. This court distinguished *Loretto, supra,* because there the government compelled the occupation of the landlord's property by a cable box as a condition of leasing apartments. *Yee* was different because the government did not compel the landlord to consent to the occupation of his property by anyone or anything other than the invited tenants.

In the present case, Dolan invites customers to her store, but not the general public for recreational purposes. Dolan's option to withdraw her application to avoid the unwanted physical occupation does not render the occupation voluntary. She has a right to build, and requiring her to submit to the physical occupation as a condition of permission is not voluntary, it is compelled. Therefore, there is a compelled physical occupation, unlike *Yee.*

This is a per se taking under *Loretto, supra.* The fact it is a condition of development approval is irrelevant. However, this court in *Nollan* found a compelled physical occupation, but still analyzed the exaction as a regulatory taking. When Tigard's exactions are analyzed under those same standards, they are still a taking.

B. If the exactions are not a per se taking, they are a regulatory taking

Tigard asserts the exactions are not a regulatory taking as they are merely conditions reasonably related to the impacts of Dolan's proposed development. However, the exactions do not substantially advance a government

interest. Rather, they single out Dolan to provide a benefit at no cost, the cost of which should be borne by the community as a whole. They exemplify municipalities' tendencies to violate property owners' rights.

1. The exactions do not substantially advance a government interest

Tigard asserts the exactions advance the government interest in reducing traffic congestion and improving drainage. However, there is insufficient evidence of this. The exactions fail the "essential nexus" test of *Nollan*. The exactions are actually for the purpose of recreation, for which Tigard must pay Dolan.

a. *Nollan* requires a two prong nexus to show the regulation substantially advances a government interest

Tigard asserts it need only show its exactions are rationally related to a government purpose, and assumptions and hypotheses are sufficient to prove this relationship. However, *Nollan* and the Constitution require more.

The right to exclude others is an essential characteristic of property ownership. *Loretto*, 458 U.S. at 433. The use of property may be regulated for the public good under the police power, but if the regulation goes too far, it will be a taking. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413-5, 43 S.Ct. 158, 67 L.Ed. 322 (1922). A regulation is a taking if it denies all economically viable use of the land or fails to *substantially* advance legitimate state interests. *Nollan*, 483 U.S. at 834 (emphasis added). A condition of

permit approval must pass a two prong nexus test to substantially advance a legitimate state interest: (1) the impacts of the development must be sufficient such that they would justify denial of the permit, and (2) the conditions must advance the same interests as denial. *Id.* at 833-6. This court did not specifically announce what type of connection between the conditions and the state interest is required, but did state the relationship is subject to higher scrutiny than the rational relationship test for due process or equal protection claims. *Id.* at 834-5, n. 3.

Evidence of this two prong nexus must be substantial, as the Fifth Amendment is more than a pleading requirement, with compliance "more than an exercise in cleverness and imagination." *Id.* at 841. This court is particularly careful about the adjective "substantial" when conveyance of property is a condition of permit approval, as there is a heightened risk that the purpose is avoidance of compensation rather than the stated police power purpose. *Id.* Findings not supported by evidence will not support the abridgement of property rights. *Id.*

In *Nollan* the beach access easement was considered a taking because it had no relationship, substantial or rational, to the government's stated impacts to be addressed.

Here, Tigard's stated purpose for the path is to relieve traffic congestion caused by the intensified use of Dolan's property. However, there was no evidence of how much increased traffic would occur and what impact it would have on surrounding roads. Tigard states Dolan's expansion "is expected to generate additional vehicular traffic." App. G-24, Pet. for Cert. This is not substantial evidence which would be sufficient to deny the permit.

If, for some reason, that "evidence" of increased congestion were sufficient to deny the permit, the exactions do not help reduce congestion, so they do not relate to the governmental purpose justifying denial. Tigard asserts, without evidence, it is "reasonable to assume" customers and employees will use the path for their transportation needs. G-24. This is a legal conclusion, not a finding. The sight of bicyclists with sinks strapped to their backs is one Tigard officials must find less absurd than other reasonable people would.

The provision for a bike rack in the store plans is not evidence that Dolan expects customers and employees to utilize the bike path. The rack is required by Tigard. Tigard can not use an amenity it requires as evidence the amenity will be used. There is no evidence that the path would be used to reduce traffic caused by the store expansion.

Additionally, there is no evidence that the expansion will increase drainage problems sufficiently to deny the project. Tigard simply asserts it is "expected" to increase runoff, and "anticipated" runoff will add to a need to manage drainage. App. G-37, Pet. for Cert. There is no indication how much drainage will increase. The land in the flood plain will remain undeveloped, even without the dedication. No development is allowed. Tigard has not shown that the undeveloped land in the flood plain can not handle the increased runoff. There is no evidence showing the dedication of land for greenway purposes is needed to address drainage.

If Tigard had any evidence of increased runoff which would cause drainage problems, Tigard might be justified

in imposing conditions that address that increased runoff. However, the exactions do not improve drainage. The land will still be available for drainage purposes, without the dedication. Therefore, the exaction of land for greenway will not ameliorate runoff impacts.

The path exaction will actually exacerbate runoff impacts. It will increase impervious surfaces, as the path will probably be paved. This will increase runoff. Therefore, not only do the exactions not advance the governmental interest of improving drainage, they actually contribute to the drainage problem.

When the exactions are compared against the stated purposes, it is apparent they do not substantially advance those purposes. There is no evidence of the impacts of the expansion or the necessity of the exactions to mitigate those impacts. The exactions are a method of obtaining land for recreational purposes from Dolan without paying for it.

b. Tigard wants the land for recreation, not to address traffic and drainage impacts

The true purpose for the exactions is recre ion, not to address drainage and traffic impacts. Tigard admits it wants the land for recreation. Tigard CDC 18.120.180.A.8, the ordinance under which Tigard required the exactions, is not aimed at drainage and traffic impacts of a proposal. It implements Tigard's Comprehensive Plan. That plan requires dedication of land along Fanno Creek for "greenway" and "bike/pedestrian pathways". App. J-1,2, Pet. for Cert. The justification for the path is that people will use it for their "recreational" needs. Tigard Plan. Comm.

Final Ord. No. 91-09 PC, App. G-24, Pet. for Cert. The exactions are not aimed at Dolan's impacts, just Tigard's desire for land for recreation.

The dedications will simply take away Dolan's right to exclude others from her property and provide land for a path and park. The path and park serve recreation purposes.

c. The Oregon Supreme Court misconstrued and misapplied *Nollan*

The OSC analyzed this case under *Nollan, supra,* deciding the exactions were constitutional. It could only do so by misconstruing and misapplying *Nollan.*

The OSC determined that *Nollan* did not require a higher standard of scrutiny than a reasonable relationship between the exactions and the stated purpose behind them. 854 P.2d at 442. In applying the "reasonably related" test, it determined that a nexus between the exactions and the proposal's impacts was essential for the exactions to be reasonably related to the impacts, but once that essential nexus was shown, the exactions substantially advanced the legitimate state interest. *Id.* at 443. This conflicts with statements in *Nollan* that the condition for abridging property rights is "substantially advancing" a legitimate state interest. 483 U.S. at 834, 841. Scrutiny of exactions is higher than the reasonable relationship test under the Due Process or Equal Protection Clauses. *Id.* at 835-6, n. 3.

The dissenters in *Nollan* understood that *Nollan* required a heightened level of scrutiny. The court was

making a "more demanding requirement" and insisting on "a precise accounting" of the development's impact on governmental interests. *Id.* at 863 (Brennan, J. dissenting). The court was demanding the police power be more than rationally based. *Id.* at 865 (Blackmun, J. dissenting).

The OSC did not apply the first prong of the essential nexus test in *Nollan,* which is whether the impacts were sufficient to deny the permit. That was assumed, for the sake of argument, in *Nollan.* That does not mean it is not a constitutional requirement. The OSC did not determine whether there was sufficient evidence to deny the permit.

In applying the second prong, the OSC wrongly believed it only needed to find a rational relationship between the dedications and the impacts which would justify denial. This led it to approve of exactions which could conceivably be related to drainage and traffic congestion, but do not substantially advance those legitimate state interests.

The OSC's error may be based on the *Nollan* court's assumption that even if it only required a rational relationship between the exactions and those assumed impacts, the exactions failed even that most untailored test. *Id.* at 835-9. That does not mean only a reasonable relationship was required.

The *Nollan* court also found its conclusion that the exactions were not a proper exercise of police power was consistent with the result in *Parks v. Watson,* 716 F.2d 646 (CA9 1983), which applied a rational relationship test between the exactions and the state's interests. *Id.* at 652-3. That is not an endorsement of the test applied in *Parks,* it is merely showing that even under the test urged

by the California Coastal Commission, the result would be the same.

The OSC was wrong to state *Nollan* did not impose a higher requirement than a rational relationship between exactions and impacts. *Nollan* requires more than a rational relationship, because exactions are subject to heightened scrutiny, and must "substantially" advance a state interest. Neither "essential nexus" required under *Nollan* was shown by Tigard.

2. Dolan has been singled out to bear the burden of providing land for recreation

The exactions are not intended to alleviate drainage and traffic congestion. Rather, Dolan, by virtue of owning property where Tigard wanted to put a path and park, and wanting to exercise her constitutional right to develop it, is being singled out among all taxpayers and landowners to provide the land without compensation.

If a property owner is singled out to bear a burden of achieving a legitimate state interest, even though he did not contribute to it more than other landowners, the government's actions violate the incorporated Takings Clause and Equal Protection Clause. *Nollan,* 483 U.S. at 835-6, n. 4. The Takings Clause is intended to bar government from forcing some public burdens on individual landowners which should be borne by the public as a whole. *Id.*

The Tigard ordinance provides the strongest evidence this is an extortion of property from Dolan unrelated to the impacts of her proposal. Tigard CDC 18.120.180.A.8

provides that a condition of development within the flood plain is dedication of land for greenway and a path. There is no requirement of an impact on drainage or traffic congestion. The impacts are irrelevant. Tigard simply wants the land. It believes it can treat development approval as a carrot, waving it before landowners as an incentive to give up their property. Tigard's findings regarding drainage and traffic are merely an exercise in "cleverness and imagination" in an attempt to comply with the nexus requirement between the exactions and the proposal. Tigard is abusing Dolan's right to develop her property.

Further evidence Dolan is being singled out is that other developments with similar or worse impacts on traffic and drainage are not required to dedicate land. A landowner across the street, whose customers and employees would use the same streets and could use the same path, and whose development increased impervious surfaces, is not required to make the same or similar dedications. In order to treat all landowners similarly, anyone who applies for a development permit should be required to dedicate land for greenway and bike/pedestrian paths. If they do not own land where Tigard wanted a path and greenway, they should be required to purchase such land and dedicate it to Tigard.

Dolan is being treated similarly to the landowner in *Nollan*. There, beach access was a legitimate state interest, while here the path and greenway are as well. In both cases, the impact of the development does not contribute to the need for the exaction any more than the actions of other landowners. The location of the property caused

the government to single out the landowner to bear the burden, which should be shared by the public as a whole.

If Dolan's expansion will add to traffic and runoff, Tigard can only exact contributions from Dolan in proportion to the impacts of her expansion. Even Tigard would probably concede it could not require Dolan to pay to resurface all the streets of Tigard because it can be assumed her expansion will cause an increase in traffic, contributing to the need to resurface the streets. That "exaction" would be out of proportion to the impacts of her proposal, and would be singling her out to bear the cost of a public improvement which should be shared by all taxpayers. That same principle of proportionality applies here, where Tigard has made no effort to show it is fairly apportioning the cost of providing land for a path and greenway based on the impacts of Dolan's expansion.

The cost of providing a greenway and path along Fanno Creek should be borne by the public as a whole. If Tigard wants the land, it should purchase it. Dolan will bear her fair share of the cost through taxes. Tigard's attempt to single out Dolan to bear the cost violates the Takings Clause of the Constitution.

3. Tigard's action shows the tendency of municipalities to use development approval to obtain benefits without cost

Tigard is not unusual in requiring exactions unrelated to a development's impacts as a condition to development approval. There is a tendency for municipalities to impose more costs of government onto individual

property owners, rather than the public as a whole. Municipalities know challenges are expensive for landowners, who often must pay rather than fight, due to lack of knowledge, resources, and/or time necessary for court challenges.

This court has stated it will be careful in scrutinizing exactions as conditions for development approval, as these conditions can be intended to avoid the compensation requirement. *Nollan*, 483 U.S. at 841. A brief look at the history of exactions, showing that exactions have gone from those inherently necessary to serve the development itself to exactions only tangentially related to the development's impacts, shows such scrutiny is warranted.

The first exactions were generally dedications of land for public improvements within a subdivision necessary for the subdivision. Note, " 'Take' My Beach Please!", 69 BUL Rev. 823, 848 (1989). The theory was that the development created the need for these public improvements, such as roads and sewers, so the developer should provide the land. *Id.* Exactions were expanded to require developers to actually construct or improve public facilities inside and outside the development. *Id.* at 849. We now have "linkage" exactions, requiring developers t provide low income housing as a condition of commercial development, on the theory that it will attract workers who will need that housing. *Id.* at 849-50; Delaney, Gordon and Hess, "Needs-Nexus Analysis", 50 Law & Cont. Prob. 139, 141-4 (Winter 1987). Some municipalities, such as Seattle, carry exactions beyond what is allowed under any nexus test, stating the test is " 'How much will you give us before you will be filing a lawsuit?' And that's

what the condition [of getting a permit] is." Statement by Director of Seattle City Attorney Land Use Division, at a seminar in March of 1988.

The lack of careful judicial scrutiny of exactions has contributed to the abridgement of property owners' rights in the name of the police power. Some courts only require a reasonable relationship between impacts and exactions, rarely scrutinizing the evidence of such impacts or the relationship. Municipalities are encouraged to obtain benefits at no cost, even when impacts are negligible and the nexus tenuous. Some go as far as disregarding the legal test altogether, seeking to extort whatever they can without being taken to court.

A decision in favor of Dolan will help constrain governmental abuses of property rights. It will especially help those property owners without the time, money, or energy to fight the government, even if they know the exaction is unconstitutional. This court should state in no uncertain terms what the government must prove before it abridges property rights in the form of exactions. This will help curb the tendency of government to use development approval to shift costs only tangentially related to a development, and wholly out of proportion to the development's impacts, onto the landowner who chooses to develop his land.

IV. CONCLUSION

Nollan, supra, was not the best case to lay down a strong rule against exactions only tangentially related to a development. The facts showed the relationship

between the exactions and governmental goals was completely lacking. This allowed courts, such as the OSC, to misconstrue the requirements upon the government when it comes to exactions. This court should show it meant what it said when it stated exactions will be given heightened scrutiny. There must be substantial evidence, not just assumptions and hypotheses, that the development will cause sufficient impacts justifying denial. Then, the exactions must substantially advance the same state interests denial would advance. Only those exactions substantially advancing legitimate state interests will be upheld.

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OCTOBER TERM, 1993

FLORENCE DOLAN, PETITIONER,

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CITY OF TIGARD, RESPONDENT

On Writ of Certiorari to the Oregon Supreme Court

BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND THE OREGON FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether a per se taking requiring the payment of just compensation occurs when a municipality physically occupies a portion of a privately-owned lot as a condition for permitting the owner to develop the remainder of the property.

2. Whether a municipality may take a portion of a privately-owned lot, without paying just compensation, as a condition for permitting a use of the remainder of the property that has not been shown to cause a nuisance.

3. Whether conditions imposed on the use of private property must be strictly scrutinized to ensure that they are narrowly tailored to abate a nuisance that would result from the proposed use.

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Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) 12

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Note, *"'Take' My Beach, Please!": Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. Rev. 823 (1989) 26

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BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND THE OREGON FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER*

INTEREST OF THE AMICI CURIAE

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. It has member organizations in all 50 states and Puerto Rico representing more than 4.2 million member families.

* Written consents of the parties to the filing of this brief have been filed with the Clerk.

The Oregon Farm Bureau Federation (OFBF) is a voluntary non-profit membership association organized under the laws of the State of Oregon. It has its principal offices in Salem, Oregon. OFBF individually and through joint and collective efforts seeks to promote, protect, and represent the economic, social and educational interests of farmers in Oregon. OFBF is composed of more than 13,500 member families in Oregon. OFBF is a member of AFBF.

The American Farm Bureau Federation and the Oregon Farm Bureau Federation have a direct interest in the outcome of this case. The members of AFBF and OFBF own or lease significant amounts of property and depend on their land for their livelihoods. They are, therefore, vitally interested in the proper interpretation of the Just Compensation Clause of the United States Constitution. The Oregon Supreme Court's ruling that government may impose an expropriatory condition on a lawful use of land not shown to create a nuisance, and thereby effectively dispossess an owner of his or her property rights without paying compensation, is contrary to the interests of AFBF, OFBF, and their members.

STATEMENT OF FACTS

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." The issue in this case is whether a municipality may require a landowner to dedicate a portion of her property to public use as a condition to granting a development permit, yet evade the constitutional obligation to pay just compensation merely by asserting that some possible harmful effect of the proposed development, which is not shown to amount to a nuisance, may be offset by the dedication. The Oregon Supreme Court incorrectly held that it may.

1. Petitioner Florence Dolan owns a parcel of 1.67 acres of land in Tigard, Oregon. The lot is currently improved with a 9,700 square foot commercial structure. Petitioner applied to the city for a permit to remove that structure and to replace it with a larger commercial building of 17,600 square feet, with appropriate parking. Pet. App. A3.

Petitioner's lot is in the Action Area Overlay Zone (AAO Zone) that overlaps part of Tigard's Central Business District Zone (CBD Zone). In the CBD Zone, the commercial use petitioner proposes "is permitted outright." Pet. App. G16. Within the AAO Zone, however, local regulations permit "[t]he City [to] attach conditions to any development" in order to implement the Tigard Comprehensive Plan. *Id.* at G17. Pursuant to these regulations, the city conditioned its grant of a permit to Ms. Dolan on her dedicating 7,000 square feet, or about one-tenth of her lot, to public use. *Id.* at A4 & n.3. This part of Ms. Dolan's lot comprised "all portions of the site that fall within the existing 100-year floodplain" of Fanno Creek, which was adjacent to petitioner's property, plus a 15-foot strip of land next to the floodplain boundary which was to be used as a greenway and for construction of a pedestrian and bicycle path. *Ibid.*

a. The city purported to justify this exaction in two ways. First, land within and adjacent to the Fanno Creek floodplain must be given over to public use "for storm water management purposes." Pet. App. G37. According to the Tigard Planning Commission, that dedication was "reasonably related" to the expansion proposed by petitioner because the new building would "increas[e] the site's impervious area," and this "would be expected to increase the amount of storm water runoff from the site to Fanno Creek." *Ibid.* The Planning Commission "expected" that such "additional stormwater runoff resulting from additional development,

both from the subject site and elsewhere within the Fanno Creek drainage basin," would "increase flow within the creek" and require "channel modifications in this area to offset the increase in stream flow." *Id.* at G40. Conditioning new development of Ms. Dolan's lot on dedication of the floodplain and adjacent area for public use would permit the city to make these channel modifications, the Commission found, thereby "reducing the possibility of floodwater damages and threats to public safety." *Ibid.*

The Planning Commission noted that the city's Master Drainage Plan called for widening Fanno Creek by only five feet, not the full 15 feet that the city exacted from Ms. Dolan adjacent to the floodplain. Pet. App. G38-G39. The additional ten-foot strip of land that the city took was to accommodate a "path [next to] and vegetative screening up to the relocated bank" of Fanno Creek. *Id.* at G42-G43. This path and screening were required, the Commission found, to implement the city's Master Plan for Fanno Creek Park, which called for the eventual creation of a 35-acre park around the creek. *Id.* at G42.

b. The city also asserted that its exaction of Ms. Dolan's land was "reasonably related" to Tigard's transportation needs. Pet. App. G24. The city had previously adopted a Comprehensive Pedestrian/Bicycle Pathway Plan which called for creation of a path in the vicinity of Fanno Creek. *Id.* at G21-G22. City regulations required that any development request for property on which that path could be located be scrutinized "to ensure that the adopted plan is properly implemented," and that development approval be conditioned on "the necessary easement or dedications for the pedestrian/bicycle pathwa[y]." *Id.* at J2. Similarly, standards for new development in the AAO Zone stipulated that the city could impose conditions to further the provision of

"continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bike paths identified in the comprehensive plan." *Id.* at G18-G19.

In accordance with these regulations, the Planning Commission, in justifying the exaction of a strip of Ms. Dolan's land adjacent to the floodplain for construction of a path and greenway, focused on the "imperative" need for a "continuous pathway * * * to function as an efficient, convenient, and safe" part of "a multi-modal transportation system serving the varied needs of the City's citizens and businesses." Pet. App. G25, G26. The Commission noted that such "a system cannot fully function with missing pieces," and that omission of the section of the planned path on Ms. Dolan's property would make the system "less convenient and efficient." *Id.* at G27.

The Commission also found that "[i]t is reasonable to assume that customers and employees of the future uses of [Ms. Dolan's] site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs." Pet. App. G24. According to the Commission, Ms. Dolan's proposed development "is anticipated to generate additional vehicular traffic" and therefore "increas[e] congestion"; "[c]reation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on * * * nearby streets and lessen the increase in traffic congestion." *Ibid.*

2. Ms. Dolan appealed the imposition of these conditions to the Land Use Board of Appeals (LUBA) (Pet. App. D1), and then to the Oregon Court of Appeals. *Id.* at C1. Each tribunal rejected Ms. Dolan's appeal, on the ground that the Tigard Planning Commission's findings had demon-

strated a "reasonable relationship" between the effects of Ms. Dolan's proposed use and the exactions that had been imposed by the city.

3. Before the Oregon Supreme Court, petitioner renewed her arguments that (1) a regulatory body must demonstrate an "essential nexus" or "substantial relationship" between the impact of a development and the dedication required, which was missing here; (2) the city had failed to show even a "reasonable relationship" between the impact of the development and the conditions imposed; and (3) because the city's conditions required permanent physical occupation of a portion of petitioner's property, they amounted to a per se taking. Pet. App. A10-A11 & n.8.

The Oregon Supreme Court rejected these arguments. First, it held that under *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), the "reasonable relationship" test governs the analysis of conditions imposed on land use. Pet. App. A13-A14. To satisfy that test, an exaction merely must "serv[e] the same purpose that a denial of the permit would serve." *Id.* at A15.

Second, the City of Tigard's findings that "expanded use of [Ms. Dolan's] site is anticipated to generate additional vehicular traffic," and that "[c]reation of a * * * pedestrian/bicycle pathway system" could "lessen the increase in traffic congestion," were sufficient to show that dedication of a strip of Ms. Dolan's property for a pathway was reasonably related to the proposed redevelopment of the land. Pet. App. A16. The city's findings that "[t]he increased impervious surface [created by the development] would be expected to increase the amount of storm water runoff," and that dedication of the Fanno Creek floodplain and an adjacent strip of land as greenway would allow for improvement of the storm drainage system, demonstrated a "reasonable

relationship" between Ms. Dolan's planned use of her property and the city's exaction. *Id.* at A15-A17.

Finally, the court also rejected petitioner's per se taking argument. Citing *Yee* v. *City of Escondido*, 112 S. Ct. 1522 (1992), it held that no per se taking occurred here because Ms. Dolan had control over whether the dedication would have to be made; she could "avoid physical occupation of [her] land by withdrawing th[e] application for a development permit." Pet. App. A11 n.8.

Justice Peterson dissented. *Nollan*, he said, imposed a more stringent standard: Government "must show that the granting of the permit probably will create specific problems, burdens, or conditions that theretofore did not exist, and that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise from the granting of the permit." Pet. App. A19. The city's findings of fact did not meet that burden. Rather, they "sugges[t] that such exactions were to be attached to *all* requests for improvement" in order to facilitate the city's previously adopted goals, such as "[p]rovision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems." *Id.* at A20, A21.

Although the city's findings "show the resolve of the city to get the easements and the purpose for the easements," Judge Peterson concluded, they "in no way establish that the easements necessarily are needed because of increased intensity of use of [Ms. Dolan's] (or anyone else's) property." Pet. App. A23. Rather, Tigard had simply "decided that it needed a pedestrian/bicycle pathway and a flood control greenway easement along Fanno Creek." It had determined that "[o]ne way of getting these, free of cost," was to require "all owners who propose to change the use of

their property to convey the easements to the city." *Id.* at A29-A30.

SUMMARY OF ARGUMENT

"[I]n any society the fullness and sufficiency of the securities which surround * * * the use and enjoyment of * * * property constitute one of the most certain tests of the character and value of the government." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 324 (1893). The City of Tigard failed that test when it required Ms. Dolan to dedicate one-tenth of her lot to public use as a condition for developing the remainder of the lot for a perfectly lawful commercial purpose that it never showed would cause a nuisance.

1. Physical occupations of private land by government are a special category, akin to eminent domain. They are never justifiable without the payment of compensation, and always constitute a per se taking. There is no exception to this rule for occupation imposed as a permit condition.

The conditions imposed by Tigard on Ms. Dolan's use of her land were a physical occupation. They required the dedication of part of Ms. Dolan's property for the construction of a pathway and greenway and for widening Fanno Creek. These physical constructs would occupy Ms. Dolan's property; and the public use of these facilities would also amount to an occupation. In these circumstances, Tigard's exaction is a per se taking for which compensation is required.

2. Under the Just Compensation Clause, government may not take private land, without paying compensation, merely to serve the public interest. It may do so only when its actions "duplicate the result that could have been achieved in the courts—by adjacent landowners * * * under the State's

law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally." *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992). That "nuisance" standard is properly applied to regulatory takings in general, including those exacted as permit conditions. Applying that standard, reversal is required in this case. The city has never even attempted to show that the alleged effects of Ms. Dolan's development in increasing stormwater flow into Fanno Creek and area traffic—the effects its conditions are purportedly designed to remedy—constitute nuisances under Oregon law.

3. Even if an increase in stormwater flow and increased traffic resulting from a development had been shown to be nuisances under Oregon law, reversal would still be required in this case. Though a municipality may impose conditions on a proposed use in order to abate a nuisance that would result from that use, such conditions do not pass constitutional muster unless they are narrowly tailored and the minimum exaction necessary to prevent the nuisance.

The conditions at issue here cannot survive that strict scrutiny. Dedication of land is never necessary to abate a nuisance, but is always a per se taking. Moreover, the city has never offered more than unsupported speculation about the impact of Ms. Dolan's development. It has not demonstrated that increased stormwater flow or increased traffic will in fact result from the proposed use; still less has it quantified those effects. It has thus failed to show that *any* particular permit condition is necessary to prevent the proposed development from creating a nuisance. To the contrary, the evidence suggests that the city's real purpose is to achieve general public goals of improving Tigard's transportation and stormwater management systems. Under the Takings Clause, Ms. Dolan may not be singled out to

contribute part of her property to achieve these general public goods.

ARGUMENT

For the Framers of our Constitution, private property was "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. Nedelsky, *Private Property and the Limits of American Constitutionalism* 9 (1990). The Framers saw the protection of property rights—rights in land in particular—as "the first object of government." *Federalist No. 10*, at 78 (Madison) (C. Rossiter ed. 1961). The Takings Clause lies at the heart of the constitutional scheme to protect such rights from the grasp of transient political majorities; it was "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). For the common good, individuals might be forced to give up their property—but only upon payment of fair compensation from the common purse.

The Oregon Supreme Court's decision in this case destroys this careful balance between individual rights and community needs. It allows a municipality to achieve public goals at the private expense of a few individuals. The court endorsed the City of Tigard's determination that rather than pay for the creation of public goods like a bicycle path or stormwater management out of the city's coffers—which might require the raising of taxes—it would extort part of some individuals' land for those purposes as the price for permitting them to use the remainder of their property in a lawful and non-noxious manner that has never been shown to create a nuisance under state law. The Takings Clause does not countenance that result. To the contrary, it specifically prohibits government from invading "private right under the

pretext of the public good." *United States* v. *Lynah*, 188 U.S. 445, 470 (1903).

I. THE FORCED DEDICATION OF PART OF MS. DOLAN'S PROPERTY FOR PUBLIC USE IS A PER SE TAKING FOR WHICH COMPENSATION MUST BE PAID

It has long been recognized that where government "regulations * * * compel the property owner to suffer a physical invasion of his property," a per se taking occurs that is "compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992). See, *e.g.*, *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1526 (1992). Thus, in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-433 n.9, 434-435 (1982), this Court noted that when government action results in a "permanent physical occupation" of property, its decisions "uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

Amici believe that this per se takings rule should be applied when government physically occupies land as a condition of its lawful use. Physical occupation is different in kind from other permit conditions, and comparable to the exercise of eminent domain. Moreover, it is difficult to imagine any circumstances in which physical occupation would be necessary to prevent a nuisance that would otherwise be caused by a proposed use. See *infra*, pages 22-23.

In order physically to occupy Ms. Dolan's land, the City of Tigard should have used its formal powers of condemnation. Having proceeded instead to impose a permanent occu-

pation on part of petitioner's property as a permit condition, the city has run afoul of the Takings Clause.

A. The City's Exaction Amounted To A Permanent Physical Invasion Of Petitioner's Land And Was Therefore A Per Se Taking

There can be no question as to the "physical" character of the occupation Ms. Dolan will suffer as a result of the conditions imposed by the city. The pedestrian and bicycle path and public greenway for which the city intends to use Ms. Dolan's land are physical constructs on the land, like the dam in *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872), and the one-half inch diameter cable deemed a physical occupation and thus a taking in *Loretto*, 458 U.S. at 422.

In addition, "permanent physical occupation" occurs when government action gives the public "a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 832 (1987); see also *Kaiser Aetna* v. *United States*, 444 U.S. 164, 178 (1979) (creation of public right of access to privately-owned pond a taking). In this case, the City of Tigard's express goal in insisting that Ms. Dolan give up part of her land for a path and greenway was to create a right of way for use by pedestrians and bicyclists, and also to further the city's goals of creating a public park around Fanno Creek. Such public uses amount to a permanent physical invasion, and thus a per se taking. See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) ("The one incontestable case for compensation (short of formal expropriation) seems to occur when

the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership").

This physical occupation of Ms. Dolan's land is unqualified. Like the television cable in *Loretto*, the path and greenway here will not be terminable by petitioner at will or after a specified period. Moreover, the terms of the city's exaction do not allow Ms. Dolan the discretion to implement time, place, or manner restrictions of the sort available to the landowner in *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 84 (1980). See also *Loretto*, 458 U.S. at 436 (the forced occupation of land is "qualitatively more severe" if the owner has "no control over the timing, extent, or nature of the invasion").

The physical invasion of petitioner's land is no less a per se taking because the city has decided to deprive Ms. Dolan of ten percent of her land rather than the entire parcel. "[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Loretto*, 458 U.S. at 436-37; see also *United States* v. *Causby*, 328 U.S. 256, 265 n.10 (1946) ("an owner is entitled to the absolute and undisturbed possession of *every part of* his premises") (emphasis added). To the contrary, permanent occupations are takings "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." *Loretto*, 458 U.S. at 430. Here, the amount of land involved and the seriousness of the interference with Ms. Dolan's use of her property dwarf the taking found unconstitutional in *Loretto*.

B. There Is No Exception To The Per Se Takings Rule For Physical Invasions Of Land Imposed As A Condition On Lawful Use

The Oregon Supreme Court refused to hold that a per se taking had occurred in this case, reasoning that Ms. Dolan had control over whether the dedication would have to be made; she could "avoid physical occupation of [her] land by withdrawing th[e] application for a development permit." Pet. App. A11 n.8. The practical implications of this analysis are astonishing.

According to the Oregon Supreme Court, government may physically occupy private land at will—even though such occupation is at the very core of the wrongs prohibited by the Takings Clause—provided only that it does so in the form of a condition related, however tenuously, to the grant of some permit. By multiplying the uses for which it requires permits, then, government can increase its opportunities for invading private land to further public goals. It is unlikely that financially-strapped municipalities will ignore this incentive. It would not be surprising, if the decision below were upheld, to see permitting requirements developed for even the most ordinary uses of land—and to see a concomitant expansion in government exactions wrung from landowners in exchange for the grant of a permit. See *Nollan*, 483 U.S. at 837 n.5.

The Oregon Supreme Court is mistaken, however, in its belief that government may escape the per se takings rule by the simple expedient of occupying private property as a condition for the grant of a permit. It would render the Takings Clause meaningless if government were able to obtain private property by this indirect means when it could not constitutionally achieve the same result by directly demanding that the landowner turn over his property. And

this Court's precedents do not allow such a result. The physical nature of the City of Tigard's occupation of Ms. Dolan's land not only brings this case firmly within the per se takings rule laid down in this Court's decisions, but also clearly distinguishes the situation here from that in *Yee* v. *City of Escondido*, 112 S. Ct. 1522 (1992), upon which the Oregon Supreme Court purported to rely.

In *Yee*, this Court considered an argument that laws controlling the rents that mobile home parks could charge their tenants and limiting their ability to terminate a tenancy amounted to a governmentally-endorsed physical invasion by the tenants, and thus were a per se taking. This Court held that the rent and tenancy regulations were not a per se taking, because the mobile home parks "voluntarily rented their land to mobile home owners," and no law "compels [the parks], once they have rented their property to tenants, to continue doing so." 112 S. Ct. at 1528. "Put bluntly, no government *has required any physical invasion of petitioners' property*"; rather, the "tenants were invited by petitioners, not forced upon them by the government." *Ibid.* (emphasis added). This, the Court noted, was very different from the per se physical taking that occurs when "government * * * *requires* the landowner to submit to the physical occupation of his land." *Ibid.* (emphasis in original).

The exactions from the park owners in *Yee* and from Ms. Dolan are very different. The regulations at issue in *Yee* merely governed a "relationship between landlord and tenant." 112 S. Ct. at 1529. Here, in contrast, the city does not seek to regulate any relationship between Ms. Dolan and bicyclists, pedestrians, or park users; there is no relationship to regulate. Ms. Dolan has *not* chosen to invite bicyclists (and so on) onto her property; she is having "strangers" forced upon her by the city. See *Loretto*, 458 U.S. at 436

("an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property").

This Court acknowledged the importance of this very distinction in *Yee*, when it said that "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy." 112 S. Ct. at 1529. This case is like the one in which government forces a tenant onto a landlord; the city seeks to compel Ms. Dolan to open up a portion of her land to recreational users in perpetuity, merely so that she can preserve her right to redevelop her land in a lawful manner.

Ms. Dolan, unlike the landowners in *Yee* who "voluntarily rented their land" (112 S. Ct. at 1528), is being *required* by the city to dedicate her land for use by the public. Although she has the option of forsaking the redevelopment of her property and thereby escaping the city's exaction, there would be nothing "voluntary" about such a decision to give up a desired and perfectly lawful use of her land. As this Court explained in *Nollan*, 483 U.S. at 833 n.2, "the right to build on one's own property * * * cannot remotely be described as a 'governmental benefit.' And thus the announcement that the application for (or granting of) the permit [to build] will entail the yielding of a property interest *cannot be regarded as establishing [a] voluntary 'exchange'*" for such a benefit (emphasis added).

Nor do *amici* believe that *Nollan*, insofar as it may suggest that physical occupation is analyzed under different rules when imposed as a permit condition, should bar the per se takings analysis set out here. To begin with, the landowner in *Nollan* does not appear to have argued that the easement exacted in that case was a per se taking. Moreover, though the easement in *Nollan* amounted to a physical

occupation, it did so far less obviously than the condition imposed in this case, which envisaged the construction of permanent physical structures—a pathway, greenway, and widened creek—on Ms. Dolan's property. In any event, *amici* can discern no justification in the language or history of the Takings Clause for treating permit conditions that require a physical occupation differently from other physical occupations.

A landowner's right to use and enjoy her property as she sees fit, provided that she does not transform her property into a nuisance, is a foundational bulwark of our polity. The notion that government has the power to force a landowner to elect either to give up that right or else to give up part of her land to public occupation is antithetical to the Takings Clause. An involuntary exaction of a portion of an individual's property as a condition for making ordinary use of the remainder of the property is unmistakably a physical invasion; *amici* urge this Court to make clear that it falls within the per se takings rule and requires payment of compensation.

II. THE CITY OF TIGARD MAY NOT IMPOSE CONDITIONS ON THE USE OF PROPERTY EXCEPT IN RESPONSE TO A THREATENED NUISANCE, AND NO NUISANCE HAS BEEN DEMONSTRATED HERE

Amici believe that the condition placed on the lawful development of Ms. Dolan's property amounted to a physical occupation, and was therefore a per se taking for which compensation is required. See *Lucas*, 112 S. Ct. at 2893; *Nollan*, 483 U.S. at 831-832. In any event, even if no per se taking were involved, the City of Tigard would still be required to compensate Ms. Dolan for the value of the land it took for public use through the imposition of a condition

on a lawful use. Properly interpreted, the Takings Clause prohibits uncompensated takings of this sort except where the goal of the exaction is to abate a nuisance that would be caused by the proposed use. Here, the city has not shown that Ms. Dolan's proposed redevelopment would cause a nuisance.

A. The Oregon Supreme Court Relied Upon A Police Powers Exception That Eviscerates The Requirement Of Just Compensation For Takings

The Oregon Supreme Court undertook no analysis of the City of Tigard's goals in depriving Ms. Dolan of a substantial part of her land. It simply assumed that the municipality's stated aims of improving stormwater management, transportation, and recreational facilities were "legitimate state interest[s]," and that no further scrutiny of the city's purposes was necessary. Pet. App. A12. *Amici* believe, however, that where government takes private property, much more searching scrutiny of its goals is required. Contrary to the Oregon Supreme Court's assumption, it should not be enough to pass muster under the Just Compensation Clause that a government acts for purposes that are within the scope of its broad police power.

To be sure, the Oregon Supreme Court's view that it need not engage in serious scrutiny of the City of Tigard's asserted goals in taking Ms. Dolan's land finds support in the language of some of this Court's precedents. This Court has frequently focused inquiry in regulatory takings cases upon the means by which government pursues its ends. It has appeared satisfied not to scrutinize the nature of those ends, provided only that they constitute "legitimate state interests."

This focus on means to the effective exclusion of ends, *amici* contend, fails to place the correct burden on government to defend the goals of an uncompensated taking. To permit municipalities to deprive individuals of their property merely in order to "advance legitimate state interests"—to further some public good or to counter some perceived public harm—would strip the Takings Clause of its central purpose to prevent the redistribution of private property by transient political majorities. Indisputably, "such a justification can be formulated in practically every case." *Lucas*, 112 S. Ct. at 2898 n.12. See also *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting) ("[N]early every action the government takes" can be described as preventing some grave public harm). As a practical matter, then, scrutiny of government's goals to see if they serve legitimate state interests is the equivalent of no scrutiny at all; it imposes no meaningful restraint on government officials.

A broad "legitimate state interest" or "police powers" exception to the Takings Clause is unwarranted in light of the history, explicit text, and central constitutional role of that provision. It would effectively interpret the Clause out of the Constitution as a restraint on regulatory deprivations of property. Justice Holmes warned of this result in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922):

> When th[e] seemingly absolute protection [of the Just Compensation Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

B. The Text, History, And Constitutional Role Of The Takings Clause Are Inconsistent With Recognition Of A Police Powers Exception

The text of the Takings Clause is unambiguous, mandating that "private property [shall not] be taken for public use, without just compensation." Although government may deprive a person of his property in order to put it to public use, government's right to do so is conditioned on the payment of just compensation. Given the explicit command of the Clause, the creation of a police powers exception is illegitimate.

The Takings Clause's history and constitutional role likewise indicate that there should be no broad police powers exception. The payment of compensation when government took private property to serve the common good was "a principle of the common law * * * of immemorial usage" (Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 583 (1972)), and the continued "protection of private property was a nearly unanimous intention among the founding generation." McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 Cal. L. Rev. 267, 270 (1988). See generally J. Story, *Commentaries on the Constitution of the United States* 510-511 (R. Rotunda & J. Nowak eds. 1987). There is no indication that the Framers thought a broad swathe cut through the middle of this principle entitled government to take property without compensation where it appeared that this would benefit the public welfare.

To the contrary, the recognition of a constitutional loophole for conditions on the use of property that merely advance "legitimate state interests" is wholly inconsistent with the historical purpose of the Takings Clause. The

Framers of the Constitution and Bill of Rights regarded the protection of individual property rights as a central goal of government. "Government," James Madison wrote, "is instituted no less for protection of the property than of the persons of individuals." *Federalist No. 54*, *supra*, at 339. The Framers would have been shocked at the notion that the Takings Clause, which lies at the heart of this protection, requires no more than lower-tier due process scrutiny of government's purposes in commandeering private property.

The Takings Clause was one of a series of protections in the Bill of Rights guarding the individual from arbitrary or oppressive actions of fleeting political majorities. The Clause disciplines government by forcing it to weigh the benefits to the community of depriving a person of his property against the constitutionally-mandated compensation that would have to be paid for the taking. Property could always be taken for the common good—but only if government were prepared to pay compensation out of the common purse. Hence the distrust of government underlying our constitutional structure of separated powers and checks and balances and our Bill of Rights can clearly be seen at work in the Takings Clause, which imposes a taxpayer burden to check the excess zeal of property-envious communities. The Takings Clause, moreover, requires the government to treat individuals with dignity by ensuring that, if government takes the individual's property, it must compensate him for that significant intrusion.

Finding "'no warrant in the laws or practices of our ancestors'" for governmental "'authority [to] inva[de] private right under the pretext of the public good'" (*United States* v. *Lynah*, 188 U.S. at 470), this Court has long recognized that the purpose of the Takings Clause was to shield individual rights from government action that would convert one

person's property to community use. See *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893) (the Clause "prevents the public from loading upon one individual more than his just share of the burdens of government"). A police powers exception to the just compensation requirement is inconsistent with this purpose. The teaching of the Takings Clause is that where public benefits are achieved by depriving individuals of property, the costs "must be borne by all [a community's] taxpayers [and not] imposed entirely on the owners of the individual properties." *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104, 139 (1978) (Rehnquist, J., dissenting). The cardinal principle that should guide interpretation of the Takings Clause is that government may *not* sacrifice the property interests of some to benefit others: "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of *paying for the change*." *Pennsylvania Coal*, 260 U.S. at 416 (emphasis added). See also *Nollan*, 483 U.S. at 841-842.

C. Any Exception To The Just Compensation Requirement Should Be Limited To The Prevention Of Nuisances

If an exception to the just compensation requirement is to be recognized for permit conditions, it must be considerably narrower than the "police powers" exception relied upon by the Oregon Supreme Court. If the Takings Clause is to give the security and predictability to property rights that the Framers intended, *amici* believe that any exception

should be no broader than that held in *Lucas* to apply to cases in which government regulation destroys the entire value of property: Government may only impose conditions on the lawful use of real property, without paying compensation, when its actions "do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners * * * under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally." 112 S. Ct. at 2900. Upon this principle, a municipality may impose a condition on the grant of a permit to use land only when it shows that the proposed use would create a nuisance identifiable as such under existing state law rules. *Id.* at 2901. There is no discernable reason why *Lucas's* "nuisance" standard should be restricted to cases involving "total takings"; a uniform rule limiting the ends for which government may deprive an owner of land without paying compensation should apply in all takings cases.

Applied to the facts of this case, the "nuisance exception" requires reversal. The City of Tigard asserted that Ms. Dolan's proposed development would increase the flow of water into Fanno Creek and would cause an increase in traffic. It purported to justify taking one-tenth of her land as a response to these concerns. The city did not even attempt, however, to "identify background principles" according to which these effects could be labelled a nuisance under Oregon law. *Lucas*, 112 S. Ct. at 2901-2902. Absent a showing that these effects were a nuisance that the city or Ms. Dolan's neighbors could have prevented by bringing an action, the city could not take Ms. Dolan's land as a condition for permitting development without violating the Takings Clause.

III. THE CITY'S EXACTION VIOLATES THE TAKINGS CLAUSE BECAUSE IT IS NOT NARROWLY TAILORED TO ABATE A NUISANCE THAT WOULD RESULT FROM PETITIONER'S PROPOSED DEVELOPMENT

A municipality may only impose an exaction as a condition on the lawful use of land in response to effects of that use that amount to a nuisance under state law. As a concomitant of that rule, *amici* believe that the *extent* of any exaction must be no greater than is necessary to abate the threatened nuisance. Even if an increase in water flow into Fanno Creek and an increase in traffic were nuisances under Oregon law—which the city has never shown—the decision below should still be reversed because it rests upon the application of too lax a standard of scrutiny of the relationship between the asserted effects of the proposed development and the dedication Ms. Dolan was required to make.

The court below found that Tigard would have no obligation to compensate Ms. Dolan under the Takings Clause if it could demonstrate a "reasonable relationship" between the effects of her proposed development and the city's decision to take a portion of her land for use as a bicycle and pedestrian path and greenway, and for storm-water management purposes. Pet. App. A13-A14. The city satisfied that standard, the court held, merely because it asserted that "the exaction serve[d] the same purpose that a denial of the permit would serve." *Id.* at A15. This resort to what is effectively lower-tier due process scrutiny is inconsistent with this Court's precedents and totally at odds with the importance that the Framers attached to the protection of property rights.

A. Exactions Of Private Property Should Be Subjected To Strict Scrutiny

The Oregon Supreme Court's "reasonable relationship" standard is contrary to this Court's decision in *Nollan*, which, as one commentator has written, "exemplified heightened scrutiny." Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission*, 12 Harv. Envtl. L. Rev. 231, 247 (1988). In *Nollan*, this Court held that in order to escape the just compensation requirement, government must show that a land use regulation "substantially advances" state interests. 483 U.S. at 834. In explicating "the standards for determining * * * what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter" (*ibid.*), this Court expressly *rejected* a suggestion that lower-tier due process or equal protection scrutiny should be used (*id.* at 834 n.3):

> [O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, * * * not that "the State *'could rationally have decided'* that the measure adopted might achieve the State's objective." * * * [T]here is no reason to believe * * * that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.

See also, *e.g.*, *Mugler* v. *Kansas*, 123 U.S. 623, 661 (1887) (a regulatory taking must bear a "real or substantial relation" to the government's goals); *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980).

At the very least, this Court's formulation of the inquiry as to whether a condition imposed upon land use "substantially advances" the government's interest suggests an intermediate level of scrutiny. *Cf. Craig* v. *Boren*, 429 U.S. 190, 197 (1976) (gender-based distinctions must be "substantially related to achievement of * * * [government's] objectives" in making those distinctions). Applying such scrutiny, a court would "rejec[t] * * * loose-fitting characterizations" of the harm a development *might* cause as "incapable of supporting" a municipality's regulatory taking. *Id.* at 199; see also Note, *"'Take' My Beach, Please!": Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. Rev. 823, 847 (1989) (under *Nollan*, "the extracted dedication must serve to alleviate the development's specific externalities; it cannot be intended to relieve burdens or losses unrelated to the development").

Amici believe, however, that a more demanding standard, comparable to that used in assessing invasions of other fundamental rights, is mandated by the importance of property rights in our constitutional scheme and the central role of private property in our Nation's economic and political success. We urge this Court strictly to scrutinize claims that a permit condition is justified because a proposed use would cause harm amounting to a nuisance. Such a condition should be upheld only where it is narrowly tailored to abate a nuisance that demonstrably will result from the proposed land use. This test accords as well with the per se takings analysis set out above (at 11-17), for we can conceive

of no situation in which it would be necessary physically to occupy property or otherwise to require dedications in order to prevent a nuisance.

The application of strict scrutiny to regulatory takings such as permit conditions is supported not only by the foundational role of the Takings Clause in our constitutional architecture—which suggests that government intrusions upon the use of private land must be minimized to the greatest extent possible—but also by this Court's decision in *Curtin* v. *Benson*, 222 U.S. 78 (1911). In *Curtin*, the United States had prevented an owner of unfenced land within a national park from grazing his cattle upon his property, as a means of preventing the cattle from wandering onto government-owned land. This Court held that the government could not regulate away such "essential uses of private property." *Id.* at 86. To ensure "that no injury could result to others," the United States might require that an owner fence his land to prevent "the trespass of his cattle on other lands," or it might simply prohibit such trespasses. *Ibid.* But it could not constitutionally seek to prevent injury by the unnecessarily overbroad means of denying the owner the use of his land for grazing.

Similarly, a number of state courts have required that a municipality justify permit conditions by showing that "the burden cast upon the [landowner] is specifically and uniquely attributable to his activity." *Pioneer Trust & Sav. Bank* v. *Village of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961). For example, in *J.E.D. Associates, Inc.* v. *Town of Atkinson*, 432 A.2d 12, 15 (N.H. 1981), overruled on other grounds, *Town of Auburn* v. *McEvoy*, 553 A.2d 317 (N.H. 1988), the court held that an exaction from a subdivision developer related to improving a road would be unconstitutional "[u]nless the traffic has increased as the result of the subdivision"; and that "[i]f traffic now is greater than before

because of the subdivision, then the [developer] can be required to contribute to the cost of [improving the road], *but only in the proportion that the increased use of the road attributable to the [developer's] subdivision bears to the road's total use*" (emphasis added). *Amici* submit that this is precisely the sort of careful analysis of whether an exaction is directly and proportionally related to the proven impact of the proposed use that is required by the Takings Clause; we add only that the impact addressed must amount to a nuisance.

B. The City Of Tigard's Exaction Of Ms. Dolan's Land Cannot Withstand Strict Scrutiny

Applying either an intermediate level of scrutiny or the strict scrutiny that *amici* believe is appropriate, reversal is required in this case. None of the agencies or courts that have considered Ms. Dolan's claims applied either of these heightened levels of scrutiny. Each inquired only whether the seizure of petitioner's property was reasonably related to the city's undocumented claims that the proposed development would burden its flood control system and cause an increase in traffic.

Furthermore, it is clear that the city's action in this case cannot withstand heightened scrutiny. Even assuming that added strain on Fanno Creek or an increase in traffic caused by the new development could be labelled a nuisance, the conditions imposed on development of Ms. Dolan's land have not been shown to be narrowly tailored to counter, or even substantially related to, those effects. First, the city has not demonstrated that those effects will in fact result from development, let alone made any attempt to quantify them. Instead, it has merely asserted that "[i]t is reasonable to assume" that customers and employees of the site "could" use the pathway, and that such use "could offset" some

assumed but undocumented increase in traffic due to the development. Pet. App. G24. And it has only postulated that "[t]he increased impervious surface" of the development will lead to some unspecified "increased storm water flow" into Fanno Creek. *Id.* at G37. Second, the city has failed to show that the conditions imposed are *proportionally* related to effects of the proposed development. Indeed, it is impossible to imagine that taking away one-tenth of an owner's land could *ever* be a necessary and proportional response to a threatened nuisance. Lesser restrictions on use would *always* be available.

Unsupported speculations about the impact of a development and the remedial effect of an exaction are wholly insufficient to justify an uncompensated taking under a heightened standard of scrutiny. As Justice Peterson said in dissent below, at a minimum the city "must show that [the proposed development] will create specific problems, burdens, or conditions that theretofore did not exist, and that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise." Pet. App. A19. In addition, *amici* believe, the city must show that any taking is no greater than necessary to remedy the problems it is able to document and that those problems amount to a nuisance. In this case, the city asks us to take on faith that Ms. Dolan's development will increase stormwater flow and pedestrian and bicycle traffic; and it has made absolutely no effort to show that those effects are a nuisance or that taking a tenth of Ms. Dolan's land is necessary to abate that nuisance.

In fact, the city's justifications for taking petitioner's land on their face strongly suggest that the city was not trying to counter the detrimental impact of the proposed development, but was using the opportunity to further its

general goals to improve transportation and recreation facilities and stormwater management. Thus, the Planning Commission conceded that it wished to widen Fanno Creek because it "expected" there to be "additional stormwater runoff resulting from additional development, both from the subject site *and elsewhere within the Fanno drainage basin*." Pet. App. G40 (emphasis added). And the Commission purported to justify taking Ms. Dolan's land for a bicycle path by reference to its desire for a "continuous pathway," with no "missing pieces," to "function as an efficient, convenient, and safe" part of "a multi-modal transportation system serving the varied needs of the City's citizens and businesses." *Id.* at G25, G26, G27. This shows, as Justice Peterson concluded, that Tigard had "decided that it needed a pedestrian/bicycle pathway and a flood control greenway," and decided that "[o]ne way of getting these, free of cost," was to take the necessary land from owners unlucky enough to need some permit. *Id.* at A29-A30. The Fifth Amendment, however, does not countenance this sort of "'out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837. Though the city's long-range transportation, recreation, and stormwater management plan "may well be * * * a good idea," landowners like Ms. Dolan cannot be singled out to "be compelled to contribute to its realization." *Id.* at 841.

CONCLUSION

The judgment of the Oregon Supreme Court should be reversed.

Respectfully submitted.

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IN THE
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OCTOBER TERM 1993

FLORENCE DOLAN,

Petitioner,

- against -

CITY OF TIGARD,

Respondent.

ON WRIT OF CERTIORARI TO THE OREGON SUPREME COURT

AMICUS CURIAE BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF RESPONDENT

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Keystone Bituminous Coal
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Lucas v. South Carolina
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Mugler v. Kansas,
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Nollan v. California Coastal
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(1987) 7,8,9,10, 11,12,14,21, 22,24

Pengilly v. Multnomah County,
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(D. Or. 1992) 20

Penn Central Transportation Co.
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No. 93-518

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AMICUS CURIAE BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE THE CITY OF NEW YORK

The City of Tigard is not alone in its need as a municipality to develop comprehensive plans for the preservation of open spaces, for dealing with drainage and other problems associated with bodies of water, and for coping with transportation problems caused by increasing congestion. It is also not alone in its imposition of conditions upon a property owner interested in developing

property in a manner that implicates those concerns. Conditional permits assist governmental entities throughout this nation in fulfilling their responsibility to ensure that land is developed in a manner that is not inconsistent with the health, safety, and welfare of its current and future residents.

The Court's review of the takings claim presented in this case is of particular concern to the City of New York as our city deals with challenges to its power to enact requirements or exact conditions of benefit to its citizens. While this case involves dedications required by the City of Tigard in response to petitioner's request for permission to double the size of her existing retail establishment, the challenge has broader implications. By seeking to require governmental entities to demonstrate a precise fit between conditions imposed and the demonstrable adverse impacts of a proposed development, it threatens the ability of states and municipalities to apply such reasonable conditions. Decisions in this area would become exceedingly strained if this Court were to adopt the strict nexus requirement urged upon it by appellant.

"The special permit or exaction zoning technique has a long history in the land use regulatory process in this country." 3 Rathkopf, *The Law of Zoning & Planning* § 41,01 at 41-2. It is not unusual for state and local governments to require the dedication of land for parks, open spaces, streets, sidewalks, schools, and other public purposes, or to impose set-back and height restrictions on developments. To now insist that governmental entities demonstrate an essential nexus or precise fit between dedications and impacts of a proposed developments would unfairly jeopardize constitutional exercise of the police power.

The City of New York urges this Court to affirm the judgment of the Oregon Supreme Court in its holding that,

at most, a developmental exaction need bear but a reasonable relationship to the impacts of the proposed development.

STATEMENT OF THE CASE

In response to petitioner's request that she be granted permission to build a new and separate commercial structure, virtually doubling the size of her existing retail electric and plumbing supply store from 9,700 square feet to 17,600 square feet, the City of Tigard granted permission based on certain conditions. Pursuant to Tigard Community Development Code 18.120.180.A.8[1] and 18.86.040.A.1.b, the city council required petitioner to dedicate (1) land within the 100-year floodplain of Fanno Creek for greenway, (2) and a 15-foot strip of land adjacent to the floodplain to accommodate storm drainage improvements and for future use as a pedestrian and bicycle pathway.[2] *Dolan v. City of Tigard*, 854 P.2d 437, 439 and n.3 (Or. 1993). Petitioner sought a variance in a one-page application, which the city denied.

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[1] According to 18.120.180.A8: "Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." The record does not reveal whether petitioner's property was purchased before or after the enactment of the statutes and regulations underlying the imposition of the conditions at issue.

[2] While the Brief for Petitioner at 8-9, n.2, refers to three other conditions, these other conditions were not contested.

Fanno Creek flows through the southwest corner of petitioner's property and along its southwestern boundary (Pet. App. E, p. E-3). At its closest point, the development petitioner proposed would be 8 feet from the boundary of the floodplain (Pet. App. G, p. G-42). Land within the floodplain is virtually unusable due to the year round water flow of Fanno Creek within a well-defined channel (Pet. App. G, p. G-39). Under City regulations, the floodplain area is not buildable land because it serves primarily as the actual stream channel of Fanno Creek (Pet. App. G, p. G-41).

The city council denied petitioner's request for a variance from the requirement for dedication of the area within the floodplain of Fanno Creek for storm water management and greenway purposes because the dedication was reasonably related to petitioner's request to intensify development on, and usage of, the site. 854 P.2d at 439. The increased impervious surface created by the almost 200% increase in the size of the proposed retail establishment would increase the amount of storm water runoff from the site to Fanno Creek (Pet. App. G, p. G-37).

> The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes.

854 P.2d at 439. The increased flow within the Creek would contribute to a rise in the 100-year flood elevation without allowing for channel modifications to be made to offset this increase in stream flow (Pet. App. G, p. G-40).

Channel modifications are needed to improve the channel's ability to transmit stormwater flows and to reduce the possibility of floodwater damages and threats to public safety (*id.*).

The city council also denied the second[3] of petitioner's requests, which sought a variance from the requirement of dedication of adequate areas for a bicycle/pedestrian path along the site's western side adjacent to Fanno Creek. The city council found the dedication "reasonably related to the request to intensify development of the site with a general retail sales use, at first, and other uses to be added later." 854 P.2d at 439.[4] The city also found that customers and employees would be able to use the pathway for their transportation needs. Creation of alternate transportation could offset increased traffic demand and congestion. 854 P.2d at 439.

Petitioner never contested the validity of the governmental purposes served by the conditions (Pet. App. D, p. D-7-8). Nor did petitioner challenge the adequacy of the findings made by the city council. 854 P.2d at 440.[5]

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[3] The two dedications were considered separately (Pet. App. G).

[4] Petitioner did not plan on demolishing the existing sales building until sometime after the new building had been completed (Pet. App. E, E-3, n.1). The building of the structure and the razing of the existing building constituted the first phase of the redevelopment of the site. In an intermediate step, a parking lot containing 39 parking spaces intended to serve the phase one building was proposed (Pet. App. G, G-9). No details were provided for phase two. 854 P.2d at 438.

[5] Even the dissenting justice of the Supreme Court of Oregon concurred that the conditions serve a legitimate state purpose. 854 P.2d at 445.

Furthermore, petitioner did not mount a challenge to the sufficiency of the nexus between the municipality's legitimate public purposes and the conditions imposed. Pet. App. D, p. D-8. The only challenge raised by petitioner was to the sufficiency of the nexus between the impacts of the proposed development and the conditions imposed in exchange for granting the permit to build. 854 P.2d at 440.

Throughout the appellate process, the two dedications were held to be reasonably related to the impacts of the first phase of the proposed development in a multi-phase redevelopment of the site. *Dolan v. City of Tigard*, 22 Or LUBA 617 (1992), LUBA affirmed the city council's decision, as did the Court of Appeals of Oregon in *Dolan v. City of Tigard*, 832 P.2d 853 (Or. App. 1992), and the Supreme Court of Oregon in *Dolan v. City of Tigard*, 854 P.2d 437 (Or. 1993).

SUMMARY OF ARGUMENT

Prior "takings" decisions of this Court have considered the character and significance of the governmental action, whether the land-use regulation substantially advances that governmental purpose, and the impact of such regulation on the economically viable uses of the property. In this case, there is no dispute that the conditions imposed, in terms of the dedication of land within the floodplain for a greenway and the dedication of land adjacent to the floodplain for a pedestrian/bicycle pathway and for storm drainage, have substantial governmental purposes and that the conditions substantially advance those purposes. There is also no dispute that the conditions do not impinge on the economically viable uses of the land.

The question before this Court is whether a new standard should be imposed on governments, which would require them to demonstrate, in a takings challenge to a

developmental exaction, that the impacts created by the proposed development are "directly, substantially, and proportionately linked in both character and degree to the dedications." Brief for Petitioner at 10. Petitioner erroneously argues that this Court's decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), requires demonstration of an essential nexus between impact and condition.

Amicus City of New York joins respondent City of Tigard in urging that this Court reject the strict nexus test suggested by petitioner. Requiring governmental entities to demonstrate the "precise fit" between conditions they impose in exchange for permits to develop land would seriously handicap state and local governments in their efforts to obtain community benefits that would offset problems generated by the development. More to the point, the essential nexus test represents a radical departure from existing takings doctrine. In considering a takings challenge to a conditional permit, where the property owner is already receiving a benefit through the grant of the permit which could have been denied, courts should do no more than examine whether a rational relationship exists between the exaction and the impacts of the development.

ARGUMENT

THE STRICTER TEST PROPOSED BY PETITIONER IN TERMS OF A PRECISE FIT BETWEEN DEVELOPMENTAL EXACTION AND DEVELOPMENTAL IMPACTS IS NOT COMPATIBLE WITH THIS COURT'S PRIOR TAKINGS DECISIONS AND SERIOUSLY DISTORTS THE REQUISITE BALANCE BETWEEN PUBLIC NEEDS AND PRIVATE INTERESTS.

A. *Nollan* Does Not Require an Essential Nexus Between Condition and Exaction.

Petitioner argues that *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), requires the government to demonstrate the existence of a *substantial* relationship (also phrased as a "precise fit" or an "essential nexus") between the impacts of a proposed development and any conditions imposed on the property owner seeking to develop that property. Despite the prior formulation by this Court of a test wherein the term "substantial" was applied solely to whether a land-use regulation advanced a legitimate state purpose, petitioner asks this Court to apply the term "substantial" to consideration of the nexus between a conditional permit and the impacts of a proposed development.

The City of New York supports the position taken by respondent City of Tigard here, as well as the decision by the Oregon Supreme Court, that, in a challenge to a developmental exaction, the takings clause is not implicated if a reasonable relationship exists between the exaction and the proposed development. The City of New York urges

that tests heretofore applied not be altered to require demonstration of the precise fit urged by petitioner.

Under traditional takings analysis, a land use regulation does not affect a taking if it "substantially advances a legitimate state interest" and does not "deny an owner economically viable use of his land." *Nollan*, 483 U.S. at 834; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978). Such analysis involves an inquiry into "the character of the governmental action" and the "economic impact on the claimant . . ." *Penn Central*, 438 U.S. at 124.

Under the first prong of such a test, petitioner does not dispute the legitimacy of the purposes underlying the enactment of the municipal ordinances. Petitioner does not contend that the dedications of greenway in the Fanno Creek floodplain for storm water management and of a pedestrian/bicycle pathway alongside Fanno Creek fail to serve legitimate public purposes. *Dolan v. Tigard*, 854 P.2d at 440. Nor does petitioner directly challenge the sufficiency of the nexus between these conditions and the municipality's public purposes in imposing the required dedications. *Id.*

Under the second prong of this test, no argument exists that the municipality's conditions would render the land economically useless. Petitioner makes no claim whatever that she will suffer economic loss. To the contrary, the record reveals that the land to be dedicated is unusable precisely because it is within the floodplain of the creek. Dedication of the land adjacent to the floodplain for a bicycle/pedestrian pathway hardly threatens petitioner economically. It is not unreasonable to assume that the pathway, if built, will facilitate public awareness of petitioner's retail store and that petitioner wishes to

encourage the public to visit this commercial establishment.

The two conditions imposed by the City of Tigard survive such a takings analysis with flying colors. Absent an ability to succeed in her claim under the previously-formulated test, petitioner tries to create a new test which seeks to examine whether a developmental condition substantially advances legitimate public purposes.[6]

Petitioner seeks to capitalize on the supposed uncertainty left in the wake of *Nollan* as to the proper test to determine whether a land-use regulation "substantially advances a legitimate state interest." Petitioner argues that *Nollan*, instead of following the time-honored test that a reasonable relationship be demonstrated between the conditions imposed and the impacts of the proposed development, requires application of a stricter standard for this relationship. It is hard, however, to argue that *Nollan* requires such a stricter standard when this Court found no nexus whatsoever between the easement imposed on one-third of the Nollan's property and the removal of obstacles preventing the public from using the beaches. 483 U.S. at 837.

Faced with a permit to build a beachfront house, which permit was conditioned on a lateral easement giving the public right of access across appellants' property, this Court in *Nollan* held that the easement imposed by the California Coastal Commission, if enacted independently, would constitute a taking because it interfered with an essential property right - the right to exclude others. If an exaction would be a *per se* taking under the "independent regulation" test, according to the *Nollan* Court, it still is not necessarily unconstitutional. The exaction may be justified as a *condition* for issuing a land-use permit.

---

[6] Petitioner concedes that rejection of heightened scrutiny is fatal to her claim. Brief for Petitioner at 32.

In turning to this part of the analysis, *Nollan* followed the traditional test used by the Court in a takings challenge to a land use regulation: such a regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his or her land. *Nollan*, 483 U.S. at 834; *Keystone*, 480 U.S. at 485; *Agins*, 447 U.S. at 260. Such a formulation clearly does not require governments to tie each application of an ordinance to specific evils, but rather assures that assertions of the public health, safety, or welfare must be more than merely illusory.

In a challenge to application of zoning ordinances, "judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land-use plan . . . . " *Penn Central*, 438 U.S. at 133, n. 29. There is no reason to urge that this Court should apply a stricter standard for the relationship between an exaction and its impact when focusing on conditional permits. Under petitioner's view, heightened scrutiny would attach in circumstances where the landowner is actually assured of some return benefit in that the condition or restriction is incorporated in a permit. It is rather bizarre to argue that a regulatory burden, which would survive a takings analysis if it were a zoning ordinance, should be subjected to stricter scrutiny when an explicit benefit is incorporated with the condition.

Nollan acknowledged that the Court had not elaborated on the standards for determining what type of connection must be demonstrated between the regulation and the governmental interest in order to satisfy the requirement that the regulation "substantially advance" that interest. Nonetheless, the Court acknowledged that a "broad range of governmental purposes and regulations" satisfy these requirements. *Nollan*, 483 U.S. at 834-35.

Furthermore, according to the *Nollan* Court, the California Coastal Commission could have conditioned construction upon some concession by the owner protecting the public's view of the beach. The condition imposed, however, utterly failed to further the end advanced as justification for the prohibition. The easement could only be used by people already on the beach. It bore no relationship to the removal of barriers preventing the public from using the beaches. Nexus was eliminated.

Thus, while petitioner argues that there must be a precise fit between an exaction and the burdens or impacts of a proposed development, the Court in *Nollan* saw no fit at all.

B. Petitioner's Interpretation Is At Odds With Takings Law.

The history of "takings" law does not support petitioner's interpretation. Takings law in this country began essentially with *Mugler v. Kansas*, 123 U.S. 623 (1887), and its holding that any exercise of the police power that was reasonably related to a legislative public purpose would be shielded from a takings inquiry. In *Mugler*, this Court made clear that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." 123 U.S. at 665. That same Court held, *id.* at 669:

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not - and, consistently with the existence and safety of organized society, cannot be - burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason

of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

Mugler can hardly be dismissed as a century-old case dealing with a nuisance. Recently this Court acknowledged that the old "harmful or noxious use" analysis of *Mugler* and other nuisance cases serves as a precursor of the Court's current formulation that a land-use regulation does not effect a taking if it substantially advances legitimate public purposes. *Lucas v. South Carolina Coastal Commission*, 112 S. Ct. 2886, 2897 (1992). As the Court noted, the distinction between a condition that is "harm-preventing" and one that is "benefit conferring" lies in the eye of the beholder. *Lucas*, 112 S. Ct. at 2897.

Similarly, the concerns expressed in *Mugler* and in the seminal case of *Euclid v. Ambler Co.*, 272 U.S. 365 (1926), addressing the needs of government in terms of land-use regulation, were recently re-expressed in *Agins*, 447 U.S. at 261. In *Agins*, the City of Tiburon used its police power to protect city residents from the ill effects of urbanization. The zoning ordinance at issue substantially advanced the legitimate government goals of discouraging the premature and unnecessary conversion of open-space land to urban uses. *Id.* This Court again resorted to a balancing of public and private interests. *Id.*

It is not illogical that "as concomitants of 'the advantage of living and doing business in a civilized community,'" landowners must bear "burdens consequent upon government action undertaken in the public interest . . . ." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984). *Keystone* made clear that deference must be granted to governmental interests and that the nature of the state's action is critical to a takings analysis. 480 U.S. at 488. In fact, *Keystone* upheld a law similar to that struck down in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), because this Court accepted that the

modern Pennsylvania law aimed at protecting the public health, fiscal integrity, and the environment by safeguarding surface land areas. *Keystone*, 480 U.S. at 488. These goals were so important that this Pennsylvania law could be upheld, against a claim by coal-mine operators that the Act took their property without just compensation, solely by reference to its purposes.

Keystone acknowledged the benefits that often occur from the restrictions placed on others, and further noted that governments and the courts do not need to calculate whether a particular individual has suffered burdens in excess of benefits. 480 U.S. at 491, n.21. This is precisely the type of thinking that petitioner rejects. For her, any burden she suffers must be in direct proportion to benefits she receives. Petitioner focuses on the "burdens" to her of the dedications, but ignores that she will benefit if her land is not flooded and if the area is improved so residents and visitors enjoy coming to her retail establishment.

While petitioner expresses outrage at the imposition of conditions in exchange for the granting of a permit to double the size of her retail establishment, takings analysis does not always yield to such outrage. As this Court stated recently in *Lucas*, 112 S. Ct. at 2899:

> It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers .
> . . .

When the *Nollan* Court considered the issue of "public need" as justification for sustaining the easement, it did so against the background of a concession by the California Commission of a lack of nexus. The Court already had found that the Commission did "not even meet

the most untailored standards." 483 U.S. at 838. An argument of "public need," however, such as in the instant case, in the face of a reasonable connection between the impact of the proposed development and the condition should be accorded great weight.

C. In A Just Compensation Challenge To A Conditional Permit, Scrutiny Is Appropriately Limited To Whether The Dedication Destroys the Economic Viability of the Property.

According to the Eleventh Circuit, differing approaches must be accorded a just compensation claim, a due process takings claim that application of a particular regulation goes so far it destroys the value of the property, and a claim that a regulation is arbitrary and capricious because it does not bear a substantial relation to the public health, safety, morals, or general welfare. *Eide v. Sarasota Co.*, 908 F.2d 716, 720-21 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). The differences among these varying types of claims affect ripeness, proof, and remedy.

A just compensation claim bypasses the prong of traditional takings analysis which questions whether a particular regulation substantially advances a legitimate state interest. Such a claim assumes the validity of the regulation and that the regulation substantially advances legitimate government interests. *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992). A due process takings claim, on the other hand, by its very nature seeks to invalidate the regulation on the basis that the regulation goes so far it destroys the value of petitioner's property and, thus, has the effect of a taking by eminent domain.

Accordingly, petitioner's just compensation claim assumes the validity of the underlying ordinances. The only issue remaining under the Eleventh Circuit's analysis of a just compensation claim is whether petitioner has been

denied all, or substantially all, economically viable use of her property. *Reahard*, 968 F.2d at 1136. The economic impact of the regulation on the claimant is examined, as well as the extent to which the regulation has interfered with her investment-backed expectations. *Reahard*, 968 F.2d at 1136. After all, when government has rendered someone's property worthless, it generally has gone too far. "[F]or what is the land but the profits thereof[?]", *Lucas*, 112 S. Ct. at 2894, quoting 1 E. Coke, *Institutes* ch. l, § 1 (1st Am. ed. 1812).

Such analysis appears in accord with the view expressed by one noted commentator that takings doctrine appears to be moving towards holding a taking exists if a regulation works a permanent physical occupation of private property by the government or undermines a distinct investment-backed expectation, or if the regulation totally eliminates the property's economic value or viability. In the absence of any of the above findings, a regulation categorically does not constitute a taking. Michelman, *Takings, 1987*, 88 Col. L. Rev. 1600, 1622 (1988).

D. Rational Relationship Provides the Only Meaningful Test and Other Courts Properly Have Adopted This Test.

Our state courts, who regularly must deal with this issue, have long understood and recognized that it constitutes a legitimate exercise of the police power for municipalities to require developers to return some benefit, commonly referred to as exactions, in exchange for the privilege of going forward with a particular project. "Exaction" is a generic term for the contribution required of a developer in exchange for the permission to develop. Note, *"'Take' My Beach, Please!": Nollan v. Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U.L. Rev. 823, 848 (1989) (hereinafter "*Exactions*"). Exactions allow municipalities to

require that private interests pay for the burdens on the community that a development creates.

Typical exactions include subdivision plans, wherein a municipality conditions approval of subdivision applications on the dedication of land for necessities created by the subdivision, such as streets, public parks, schools, sidewalks, and utility lines. Numerous enabling statutes exist which authorize local governments to adopt subdivision regulations requiring developers to dedicate certain improvements. In addition, where new developments will lead to increased use of pre-existing roads, municipalities have required developers to improve roads outside the development. It is also not unheard of for cities to condition permission for a new development, which will attract new workers and create a need for more housing, upon the developer's commitment to build some low-income housing. *Id.* at 849.

The City of New York urges this Court to recognize that, not only does the test proposed by petitioner have no basis in law, it conflicts with the realities of municipal governance. For instance, in 1982, the City Planning Commission and Board of Estimate approved new zoning regulations to govern the central business district of midtown Manhattan. While the rezoning increased the number of areas in which the highest density commercial and residential buildings could be built, the Commission and Board sought to minimize the impacts of the population of these new buildings on the sidewalks, streets, and subways. Therefore, included in the zoning regulations were requirements that all new buildings over 70,000 square feet be designed and built to provide on-site public improvements. The requirements allow for widening of the sidewalk to provide space for pedestrians to walk other than on the sidewalk; "through-block connections," *i.e.*, passageways for the public to cross *through* the block; and, if the building is constructed on a corner which has a

subway stair in the sidewalk, an interior subway stairs so that sidewalk space can be recaptured for pedestrians. Examining such requirements under the microscope of a strict standard, that is one requiring a demonstration that the conditions "directly, substantially, and proportionately [are] linked in both character and degree" to the impacts of the development, would seriously tie the hands of the City of New York.[7]

More recently, in 1992, the City Planning Commission and City Council considered zoning and land use actions which would allow redevelopment of the 74 acre waterfront on Manhattan's West Side (formerly the rail yard). The Riverside South development is to consist of over 6 million square feet of housing, 600,000 square feet of retail and office space, 1.2 million square feet of television studios, and 12 parking garages. Pursuant to the City's Uniform Land Use Review Procedure and its City Environmental Quality Review, the development proposal and actions were subject to more than eighteen months of technical analysis, public review and hearings prior to vote and approval by the City Planning Commission. In granting approval, however, the Commission required that the developer agree to numerous conditions designed to insure all necessary urban services for the site as well as to mitigate possible environmental impacts. The conditions include construction of a 28-acre waterfront park with the capital costs of the park to be borne by the development; upgrading of the nearby subway stations; reservation of 12% of the housing constructed to be used for affordable housing; and construction of certain streets and infrastructure. Again, a strict-relationship test would ill

---

[7] The City does not suggest that such requirements would not pass a stricter scrutiny, but includes these examples to demonstrate the complexity of issues facing municipalities in this area and the difficulties that would be engendered by the rigid test proposed by petitioner.

serve preservation of a proper balance between the public and private interests at issue here.

The City of New York must also deal with its watershed and must limit activities that can occur within certain distances of watercourses, wetlands, reservoirs, reservoir systems, and controlled lakes. For instance, to safeguard the City's water supply system, the City prohibits new impervious surfaces, except for roads, from being within 100 feet of a watercourse or wetland and within 300 feet of a reservoir, reservoir stem, or controlled lake. New roads are prohibited within 50 feet of a watercourse or wetland and within 100 feet of a reservoir, reservoir stem, or controlled lake.

There are other restrictions designed to prevent pollutants from entering the City's water supply which are a critical component of the City's effort to avoid having to filter its water supply. These restrictions involve storage of hazardous substances, storage of hazardous wastes, wastewater treatment plant seepage units or fields, septic system absorption fields, and junkyards.

As occurred in the City of Tigard, the need for such regulations and their impacts were analyzed by the City in an environmental impact statement. Furthermore, the regulations apply uniformly to all new development. The City of New York does not, and cannot, re-assess the need for such restrictions each time a project is proposed and then specifically tailor the restrictions to the specific problem caused by a particular parcel. Again, the reasonable relationship test is the only test that makes sense given the realities of municipal problems in safeguarding the public good.

The reasonable relationship test also has been adopted by most courts that have addressed the question. For instance, the Ninth Circuit followed this time-honored

test recently in *Commercial Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992) (rejected argument that *Nollan* imposed a higher level of scrutiny for consideration of a challenge to an ordinance conditioning certain commercial development on payment of a low income housing fee); *Leroy Land Development v. Tahoe Regional Planning Agency*, 939 F.2d 696, 699 (9th Cir. 1991) (the "substantial" requirement applies to the relationship between the conditions and the governmental purposes, not between the conditions and the impacts); *Pengilly v. Multnomah County*, 810 F. Supp. 1111, 1113 (D. Or. 1992) (government not required to show that proposed developments would have a deleterious impact before requiring certain dedications).

The rational relationship test essentially originated in the State courts based on the constitutional notion that "any exercise of the police power must be reasonably related to a legitimate public purpose." *Exactions*, 69 B.U.L. Rev. at 851. Exactions were, and still are, considered to be land-use regulations which "offset the negative externalities that often accompany new development." *Id.* These "negative externalities" generally would justify a municipality in banning the development on the grounds that a ban would be reasonably related to a legitimate governmental purpose. *Id.* In this sense, developmental exactions offer an alternative to a complete ban. Rather than prohibiting the development, municipalities require developers to make some kind of contribution to offset its undesirable consequences.

The rational relationship test requires some nexus, but not the precise fit urged by petitioner here. *Ayres v. City Council*, 207 P.2d 1 (Cal. 1949) (four conditions imposed on subdivision were reasonably related to the needs created by the proposed development); *Bethlehem Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981) (building permit subject to conditions for the provision of

public improvements); *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. Dist Ct. App. 1983) (upheld an ordinance requiring a developer to dedicate land, or pay a fee, for expansion of the county park system); *Lampton v. Pinaire*, 610 S.W.2d 915 (Ky. App. 1980) (upheld dedication requirements as a condition to plat approval because dedications were based on reasonably anticipated burdens of the development); *Petterson v. City of Naperville*, 137 N.E.2d 371 (Ill. 1956) (upheld ordinance requiring property owners to provide proper drainage facilities as a condition of subdivision approval); *Collis v. City of Bloomington*, 246 N.W.2d 19 (Minn. 1976) (requiring a showing of a reasonable relationship between the planned subdivision and the municipality's need for land); *Home Builders Ass'n v. City of Kansas City*, 555 S.W.2d 832, 835 (Mo. 1977) (a requirement imposed on a subdivider is permissible only "if the burden cast upon the subdivider is *reasonably* attributable to his activity"); *Billings Properties, Inc. v. Yellowstone Co.*, 394 P.2d 182, 188 (Mont. 1964) (an exaction that reasonably responds to a need created by the subdivision is within the bounds of the police power); *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984) (adopted a reasonable-connection analysis); *Call v. City of West Jordan*, 614 P.2d 1257 (Utah 1980) (affirmed use of reasonable relationship test); *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 448 (Wis. 1965) ("a required dedication of land for school, park, or recreational sites as a condition for approval of the subdivision plat should be upheld as a valid exercise of the police power if the evidence reasonably establishes that the municipality will be required to provide more land for schools, parks, and playgrounds as a result of the approval of the subdivision."), *appeal dismissed*, 385 U.S. 4 (1966).

E. This Case Does Not Provide a Takings Problem Under *Nollan*.

Under *Nollan*, a permit condition, which serves the same legitimate police-power purpose as a refusal to issue the permit would serve, should not be considered a taking if the refusal to issue the permit would not constitute one. 483 U.S. at 836. Here, the City of Tigard could have denied the expansion permit in order to prevent the more significant drainage problems that would result from the increased impervious surface of the vastly expanded new building - the very same purpose that the dedication of land was intended to serve. Furthermore, the City of Tigard could have denied the permit to expand the commercial building out of concern that the increased traffic generated by the expansion, both pedestrian and vehicular, would add to the congestion in this area. Since denial of the permit here would serve the same governmental purpose as the conditions imposed, the conditions survive the independent regulation test of *Nollan*.

These conditions further survive analysis, under the second phase of the *Nollan* inquiry, a phase which this Court may not even reach since, as petitioner concedes, the dedications do not amount to a *per se* taking under the permanent physical occupation doctrine.[8] Under the second phase of the *Nollan* inquiry, a condition which if enacted independently would constitute a taking, does not violate the Fifth Amendment when considered as a condition, unless it fails to substantially advance legitimate state interests or denies an owner economically viable uses of his land.

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[8] Petitioner has abandoned its argument, raised in the Petition for Certiorari at 19-23, that the second condition must be considered a *per se* taking because it involves a permanent physical occupation of private property.

Here, the legitimate character of governmental interests in preventing flooding and minimizing an increasing problem with traffic congestion is not at issue. Petitioner makes no claim that the dedications interfere with her reasonable investment-backed expectations. Since land within the floodplain is unusable, the dedication of that land cannot remotely be considered to have interfered with what must be regarded as petitioner's "primary expectation concerning the use of the parcel." *Penn Central*, 438 U.S. at 136.

Under a rational nexus test, the city council for the City of Tigard, LUBA, the Oregon Court of Appeals, and the Oregon Supreme Court, all had no difficulty in finding a reasonable relationship between the proposed development and the conditions imposed. The Supreme Court of Oregon quoted at great length from the city's findings concerning the relationship between the dedications and the anticipated impacts of the proposed development, and further noted that petitioner did not challenge these findings. *Dolan v. Tigard*, 854 P.2d at 439. The city's unchallenged findings show that, since the proposed development would cover petitioner's property with a much larger building as well as with parking facilities, which developments would increase the site's impervious area and increase the amount of storm water runoff into Fanno Creek, it was not unreasonable for the city to require the dedication of a portion of the property for improvement of a storm drainage system. *Id*, at 443-44. The city's unchallenged findings also demonstrated the reasonableness of the dedication of a pedestrian/bicycle pathway since increased traffic congestion would be generated by employees and customers as a result of development of the property. *Id*. at 443.

That the City of Tigard had plans encompassing Fanno Creek, which plans were set forth in ordinances enacted pursuant to state regulations, does not transform this into an inverse condemnation case. In response to

Oregon's requirement that its cities plan for adequate storm drainage, the City of Tigard undertook an engineering analysis which resulted in the Tigard Master Drainage Plan. The study identified a legitimate concern: increased urbanization of the area around Fanno Creek would increase the propensity of the creek to flood. Additionally, in response to the state's requirement that cities plan for future urban transportation needs, the City of Tigard developed a comprehensive pedestrian/bicycle pathway plan. Petitioner's site is located in downtown Tigard where congestion is at its greatest level. The city's plan for a bicycle/pedestrian pathway was intended to facilitate access in this downtown shopping area.

Petitioner can hardly claim that the "burdens" of the dedications were "so substantial and unforeseeable, and can so easily be identified and redistributed, that 'justness and fairness' require that they be borne by the public as a whole." *Kirby*, 467 U.S. at 14. Nor can petitioner claim that the dedications prevent her from pursuing her "reasonable investment backed expectations." *Agins*, 447 U.S. at 262-63.

Petitioner has properly abandoned the argument, mentioned in her petition for certiorari, that the condition concerning the bicycle/pedestrian pathway constituted a *per se* taking. That doctrine has no application here. There is no permanent physical occupation. There is merely the dedication of land that may eventually be used to allow persons to pass and repass, but not to allow persons to remain permanently on the land. An "easement of passage, not being a permanent occupation of land" is not, without more, a taking of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

While *Nollan* falls within the permanent physical occupation doctrine because it involved the legal displacement by means of a deed restriction of one-third of

the total area of appellants' property (Appellants' Brief to this Court in *Nollan* at 5, 13), the same is not true here. It was not the passage and re-passage of persons that satisfied the permanent physical occupation test, but rather, as appellants argued, the deed restriction required by the California Coastal Commission (*Id.* at 19-20). Similarly, the United States argued that the California Coastal Commission's lateral access dedication requirements did "not qualify as 'permanent' in nature or as a physical 'occupation' of private property, since the public obtains only a right to 'pass and repass' and not a right to occupy permanently appellants' beach . . ." *Amicus Curiae* Brief for the United States in *Nollan* at 14-15.

Here, petitioner has not even sought to exclude the public from her property. Her plans for expansion involve the creation of 39 parking spaces, as well as three bike racks and a place for handicapped parking. The public is already invited on petitioner's land to shop at her retail establishment. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (no takings where owner had opened his property to the general public).

Finally, there is not the government compulsion necessary to a finding that physical occupation of property constitutes a *per se* taking. The City of Tigard is not taking title to petitioner's land. It was only in response to petitioner's request to develop her property that the municipality required certain dedications. Government compulsion is absent here. Yet, "[t]his element of required acquiescence is at the heart of the concept of occupation." *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987).

* * *

In conclusion, it is clear that "[u]nder our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make

of their property." *Keystone*, 480 U.S. at 491. At a minimum, municipal agencies and planning boards need to be able to condition approval of a development upon an exaction, particularly if the problem sought to be solved by the condition will be caused or exacerbated by the development. Conditions should not be struck down under the Takings Clause unless they make the land economically unviable for the property owner and fail substantially to advance a legitimate state purpose, that is, no rational relationship exists between the conditions placed on the use of the land and the development proposed by the property owner. Such is not the case here.

CONCLUSION

THE JUDGMENT OF THE OREGON SUPREME COURT SHOULD BE AFFIRMED.

Respectfully submitted,

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No. 93-518

In the Supreme Court of the United States

OCTOBER TERM, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OREGON

Brief for the State of Oregon as Amicus Curiae Supporting Respondent

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QUESTION PRESENTED

Where a city has determined through extensive study that increasing the density of commercial development in a particular locale will aggravate an existing flood hazard and will place additional burdens on the city's transportation system, may the city by ordinance condition approval of development on the landowner's dedication of easements that will permit the city to improve the floodplain and enhance transportation for pedestrians and bicyclists?

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Or. Admin. R. 660-15-000(12) 13

Other Authorities

Hayes, *Approvals Put Final Touches on State Land-Use Plan*, The Oregonian, Aug. 8, 1986 6

Howe, *Growth Management in Oregon*, in GROWTH MANAGEMENT: THE PLANNING CHALLENGE OF THE 1990's (1993) 29

G. KNAPP & A. NELSON, THE REGULATED LANDSCAPE (1992) 29

Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 ENVTL. L. REP. 10367 (1992) 29

Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulations*, 74 MICH. L. REV. 901 (1976) 2, 7

Reiser, *Managing the Cumulative Effects of Coastal Land Development: Can Maine Law Meet the Challenge?*, 39 ME. L. REV. 321 (1987) 7

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INTEREST OF THE STATE OF OREGON

This case concerns a challenge to the constitutionality of conditions placed on a commercial development permit by the City of Tigard, a political subdivision of the State of Oregon. The city approved petitioner's proposal to intensify the use of her business property on the conditions, *inter alia*, that (1) she dedicate an easement to the portion of the property that lies in a floodplain to permit improvement of the storm drainage system, and (2) she dedicate an easement across a 15-foot strip of land next to the floodplain, upon which the city would construct a pedestrian/bicycle pathway. Petitioner attacks the exactions as uncompensated "takings" under the Fifth Amendment of the federal constitution.

Two decades ago, Oregon embarked on a coordinated land use planning program that dramatically differs from what it or other States followed at that time.[1] In Oregon, comprehensive local and regional land use planning is a mandatory process actively overseen at the state level. A specially created state agency sets land use standards with which all state and local land use decisions must comply. Those standards address all aspects of land use, including housing, commercial and industrial development, transportation, public facilities, energy, natural resources and development of rural land. In addition, the standards stress involvement of all the citizens of the State in the planning process. Local and regional entities, such as cities and counties, are required to engage in comprehensive planning that culminates in the adoption of a written planning document. They must anticipate all local conditions that presently or will in the future bear on the statewide goals, such as the impacts of development or intensified uses on transportation, natural disasters and hazards, and public services. Moreover, that

[1] Oregon adopted this changed approach to land use planning with the passage of Senate Bill 100 in the 1973 legislative session. Under the traditional and more common model, most land use decisions are a product of zoning. Comprehensive planning is not a condition to the exercise of zoning power. Instead, the comprehensive planning process typically is limited to public facilities (*e.g.*, public capital facilities, streets and open spaces) and there is no statewide coordination of local planning. *See generally* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulations*, 74 MICH. L. REV. 901, 901-10 (1976). Oregon departed from this model, even before the changes the legislature made in 1973. If cities and counties wanted to exercise zoning authority, they were required to have comprehensive plans, and zoning regulations were subordinate to those plans. *See generally Fasano v. Board of County Commissioners of Washington County*, 264 Or. 574, 507 P.2d 23 (1973) (decided under pre-1973 statutes). Zoning became mandatory in 1969. 1969 Or. Laws ch. 324. But until the 1973 legislation, there was no statewide coordination or oversight of local planning, and no mechanism existed to ensure that local planning took place.

planning must be supported by extensive factual and expert documentation. When the plan is complete, it is reviewed and must be approved at the state level. From initial study through final approval, local citizens have significant opportunities, administratively and judicially, to be heard, to examine the factual bases for the planning choices, and to seek to have a plan rejected if it does not anticipate relevant land use impacts.

The State of Oregon has a direct interest in this case because petitioner's position fundamentally implicates the integrity and efficacy of Oregon's comprehensive statewide land use planning process. Petitioner's argument focuses on whether the city's development conditions have the required relationship to the expected impacts of her proposed land use. That question cannot be completely answered, however, by looking solely to petitioner's application for a land use change and the events that transpired in response to that application. Instead, whether the required relationship exists must be considered in the context of the statewide land use planning process that led in significant part to the action that the City of Tigard took on petitioner's application. The State of Oregon submits this amicus brief so that the Court will better understand the comprehensive land use planning program now in place in Oregon, complete with the procedural and substantive protections that program provides, all of which properly should bear on the Court's consideration of the legal issues this case raises.

STATEMENT

Amicus State of Oregon offers this brief in support of respondent City of Tigard. The State agrees with respondent City of Tigard's statement of the case, including its statement of facts. The posture of the case and the context in which it arises is elaborated upon below in the discussion of Oregon's general land

use planning process and the manner in which the City of Tigard's comprehensive plan complied with that process.

SUMMARY OF ARGUMENT

The City of Tigard's comprehensive plan and development code are the product of a process that began with collection of evidence about development within the city, including information on flooding along Fanno Creek and transportation needs in the area of petitioner's business. The plan and development code address transportation, flood control, and other public and private property needs identified early in the planning process. Specifically, the plan identifies the development of petitioner's and other property along Fanno Creek as exacerbating storm drainage problems and transportation concerns, and as properties that would benefit from improved storm drainage and transportation facilities. The plan also prescribes actions to be taken to protect property near the Fanno Creek floodplain from hazards, as well as to provide properties in the area, including petitioner's, with adequate public transportation and access. To assist in offsetting the impacts of development, the city chose to require dedications of land for flood control, transportation and greenway needs. Its plan and the ordinances implementing it therefore exact those dedications as a required part of development approval.

Petitioner's position is that the city, to avoid an unconstitutional taking, must measure the impacts of her proposed use with mathematical precision and then tailor the conditions narrowly to meet those impacts only. Implicit in her position is the claim that the city cannot impose conditions designed to meet the larger strain on public services that development in that area, individually and cumulatively, would cause. Contrary to her argument, the Court's "takings" jurisprudence neither requires a site specific quantitative measure of a proposed development's precise

impacts nor limits conditions, including exactions, to offset only the impacts caused by a specific use. Government constitutionally may impose conditions on new or changed development when the development, either individually or cumulatively, will burden a legitimate public interest as long as the condition advances that *same* interest. In this case, the extensive study and planning that were the predicate to the city's land use legislation provided the nexus between the impacts of the development and the conditions the city placed on it, a nexus that petitioner maintains is completely lacking.

Under these circumstances, if the condition can be avoided at all, the burden should fall on the developer to demonstrate that a particular site or proposed use is uniquely situated and that the required nexus is lacking, or that the exactions are wholly disproportionate to the development's impacts. Petitioner attempted to avoid the required easement dedications by seeking a variance from the city's ordinance. In that proceeding, however, she declined to come forward with any claim or evidence that her development would not contribute to the impacts for which the city had comprehensively planned. Absent any challenge to the city's findings or its reliance on its prior planning, petitioner's constitutional attack must fail.

ARGUMENT

In 1973, the Oregon Legislature declared that the uncoordinated use of lands within the State threatened orderly development, the environment and "the health, safety, order, convenience, prosperity and welfare of the people of the state." Or. Rev. Stat. § 197.005(1). With that declaration, Oregon embarked on an ambitious process of land use planning and management, one that involves legislatively mandated planning for all land use impacts and provides comprehensive, statewide objectives to be

served by that planning. The planning process that Oregon mandates has required a massive and unprecedented investment of resources and effort on the part of government, business, citizens and interest groups alike. Thus, although Oregon's model has been in place for two decades, it has only recently begun to reach maturity. Nearly 13 years were required for Oregon to arrive at the point where approved comprehensive plans were in place for every region and locality in the State.[2] With the blueprint drawn and the foundation laid, however, Oregon has positioned itself to move into the Twenty-first Century prepared for the challenges of increased growth, population density, and economic shifts that the future without question holds.

An understanding of Oregon's land use planning process is necessary to provide the context for the legal issues the Court will resolve in this case. As the description below reveals, Oregon's comprehensive land use program itself provides the nexus that the Takings Clause requires when, as here, land use changes are conditioned on certain exactions. But an understanding of Oregon's system is important for a second reason. Petitioner essentially seeks a holding from the Court that would force planning entities, like Oregon cities and counties, to duplicate the study, effort and expense of their planning efforts on a site by site basis whenever a comprehensive plan and implementing regulations require exactions as a condition of

[2] Because of the complexity of the undertaking, completion of the planning throughout the State took much longer than sponsors of the 1973 legislation envisioned. *See* Hayes, *Approvals Put Final Touches on State Land-Use Plan*, The Oregonian, Aug. 8, 1986 (statements of Sen. Hallock). The achievement was one Oregon marked with pride. As the former director of DLCD commented: "I don't think there is any other state in the nation that can boast that every square inch of their cities and counties is all planned and zoned in a coordinated way." *Id.* (quote from James F. Ross).

proposed new development or uses. Beyond the obvious frustration and wastefulness of that result, Oregon also would be left with a program of comprehensive planning accompanied by at best uneven and uncertain implementation. Oregon submits that nothing in the constitution mandates that interference with state land use planning and management efforts.

I. AN OVERVIEW OF OREGON'S STATEWIDE LAND USE PLANNING PROCESS.

"Traditionally, American planning enabling legislation has not contained substantive planning policies, has rarely prescribed the contents of the plan, and has seldom indicated the goals that the plan should achieve."[3] In Oregon, however, none of those traditional observations is true. Nor is it true in Oregon that land use is an exclusively local concern.[4] Instead, Oregon land use planning is truly comprehensive and is coordinated on a statewide basis.

A. The Requirement of Mandatory Comprehensive Planning.

When the Oregon Legislature set the State's new course in 1973, it created the Land Conservation and Development Commission (LCDC) and the Department of Land Conservation

[3] Mandelker, *supra*, at 951.

[4] *See* Reiser, *Managing the Cumulative Effects of Coastal Land Development: Can Maine Law Meet the Challenge?*, 39 ME. L. REV. 321 (1987) (discussion of the challenge of managing the cumulative impacts of development, which increasingly cross municipal and other local government boundaries, given that land use control traditionally has been considered a matter of local concern).

and Development (DLCD),[5] which together are charged with the responsibility to identify and adopt goals and guidelines to control land use planning activities in Oregon. Or. Rev. Stat. §§ 197.225, 197.240.[6] The agencies promulgated a total of 19 goals, complete with definitions and implementing guidelines, which serve as the standards governing all land use planning in Oregon. Or. Admin. R. 660-15-000 *et seq.*

By statute, each city and county in Oregon must adopt a "comprehensive plan" and implementing regulations (*e.g.*, ordinances) in compliance with the goals adopted by the commission. Or. Rev. Stat. § 197.175. Oregon law defines the "comprehensive plan" as:

> a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of land, including, but not limited to, sewer and water systems, transportation facilities, and natural resources and air and water quality management programs.

Or. Rev. Stat. § 197.015(5). In turn, "comprehensive" means "all-inclusive, both in terms of geographic area covered and functional and natural activities and systems occurring in the area covered by the plan." *Id.* A land use plan is "coordinated" when

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[5] The Department of Land Conservation and Development (DLCD) includes the Land Conservation and Development Commission (LCDC). Or. Rev. Stat. § 197.075. The *commission* is the policy making body responsible for adoption and promulgation of the Statewide Land Use Planning Goals, and the *department* serves as the commission's administrative arm. *See* Or. Rev. Stat. §§ 197.030 to 197.065 and 197.075 to 197.095.

[6] Citations to Oregon statutes (Or. Rev. Stat.) and administrative rules (Or. Admin. R.) are to those in effect on the date the city's comprehensive land use plan and ordinances were found by LCDC to be in compliance with the statewide goals (Sept. 24, 1985).

"the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible." *Id.*

Once the comprehensive plan declares the governing land use policies for the jurisdiction, those policies must be implemented through one or more land use regulations. Oregon law defines "land use regulation" to encompass:

> any local government zoning ordinance, land division ordinance * * * or similar general ordinance establishing standards for implementing a comprehensive plan.

Or. Rev. Stat. § 197.015(11). Together, the comprehensive plan and the implementing land use regulations provide both the overall policy statement and the specific regulations necessary to control uses of land within the planning jurisdiction.

B. The Statewide Goals For Comprehensive Planning.

In complying with the legislative mandate to adopt a comprehensive plan and implementing ordinances, state and local planning entities are required to address each of the applicable 19 Statewide Land Use Planning Goals. Particularly relevant to this controversy are goals addressing citizen involvement in the planning process, the planning process itself, natural disasters and hazards, the State's economy, public facilities and services, and transportation. The State therefore offers a brief review of those goals.[7]

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[7] Goals addressing estuarine resources, coastal shorelands and beaches and dunes (Goals 16–18) were not applicable to the city's planning efforts.

1. *Goals 1 and 2 - Citizen Involvement, Factual Support and Data*

Goals 1 and 2 are principally concerned with the planning process and structure. Together, they superimpose on all land planning activities (including all phases of those activities) various procedural mechanisms that are designed to ensure quality in the decision-making. The two requirements of the goals most relevant to this case are those guaranteeing citizen involvement in the planning process and insisting on a full "inventory" of planning needs and factual data relevant to those needs.

The "Citizen Involvement" goal, Goal 1, exists:

> [t]o develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.

Or. Admin. R. 660-15-000(1). It requires the local government to adopt and to publicize a program for citizen involvement that "clearly defines the procedures by which the general public will be involved in the on-going land-use planning process." *Id*. The program must be adequately funded, involve a cross-section of affected citizens, assure effective two-way communication with citizens, provide opportunities for citizens to be involved in all phases of the planning process, assure that technical information is available in an understandable form, and assure that citizens will receive a response from policy makers. *Id*. The goal serves to guarantee that planning jurisdictions will meaningfully include citizens (and businesses) in the planning process, rather than surprise them with a plan and ordinances that have been developed privately by government staff.

The "Land Use Planning Goal," Goal 2, exists:

> [t]o establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions.

Or. Admin. R. 660-15-000(2). The goal is particularly relevant to this case because under it, land use plans must expressly consider the character of all land in the planning jurisdiction, the specific statewide goals that are implicated by the character of the land, and certain factual information that bears on each statewide goal. Specifically, Goal 2 requires the planning entity to include:

> identification of issues and problems, inventories and other factual information for each applicable statewide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs.

Id. The goal requires that this factual information be contained in the plan document or in supporting documents. Both the plan and the supporting documents must be easily accessible to the public, thus reinforcing the citizen involvement provisions of Goal 1. *Id*.

2. *Goal 7 - Natural Disasters and Hazards*

Goal 7, "Areas Subject to Natural Disasters and Hazards," is a substantive goal that serves to minimize the aggravating effects of land use decisions on destructive natural hazards. Specifically, the goal seeks "[t]o protect life and property from natural disasters and hazards." Or. Admin. R. 660-15-000(7). All comprehensive plans therefore must include "an inventory of known areas of natural disaster and hazards." *Id*. The goal defines those areas to include "stream or ocean flooding, ground water erosion and deposition, land slides, earthquakes, weak foundation soils and other hazards unique to local or regional areas." *Id*. The goal achieves its protective end by prohibiting new uses or developments that would be subject to damage or that could result in loss of life in known areas of natural disasters

and hazards unless the planning entity provides "appropriate safeguards." *Id.*

3. *Goal 9 - Enhancing the Economy*

Entitled "Economy of The State," Goal 9 mandates that plans must contribute to a stable and healthy economy and must be based

> on inventories of areas suitable for increased economic growth and activity after taking into consideration the health of the current economic base; materials and energy availability; labor market factors; transportation; current market forces; availability of renewable and non-renewable resources; availability of land; and pollution control requirements.

Or. Admin. R. 660-15-000(9). Significantly for this case, a jurisdiction cannot simply promote economic growth without regard to the services needed to support that growth. Under Goal 9, the planning entity is specifically obliged to consider transportation and other resources as part of its economic planning. *Id.*

4. *Goal 11 - Public Facilities and Services*

Goal 11, "Public Facilities and Services," directs the planning jurisdiction:

> [t]o plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.

Or. Admin. R. 660-15-000(11). To ensure that development does not outpace services necessary to support it, the goal mandates:

> Urban and rural development shall be guided and supported by types and levels of urban and rural public facilities and services appropriate for, but limited to the needs and requirements of the urban, urbanizable and rural areas to be served. A provision for key facilities shall be included in each plan. To meet current and long-range needs, a provision for solid waste disposal sites, including sites for inert waste, shall be included in each plan.

Id. Thus, the goal's express demand that land use plans anticipate facilities and services "appropriate for, but limited to" the needs and requirements of urban and rural development inherently imposes on the planning process a requirement that development not expand unless the services necessary to support it are in place and are in keeping with the scale of the development.

5. *Goal 12 - Transportation*

Goal 12, "Transportation" is "[t]o provide and encourage a safe, convenient and economic transportation system." Or. Admin. R. 660-15-000(12). The goal directs that the transportation provisions of a comprehensive plan shall:

> (1) consider all modes of transportation including mass transit, air, water, pipeline, rail, highway, bicycle and pedestrian; (2) be based upon an inventory of local, regional and state transportation needs; (3) consider the differences in social consequences that would result from utilizing differing combinations of transportation modes; (4) avoid principal reliance upon any one mode of transportation; (5) minimize adverse social, economic and environmental impacts and costs; (6) conserve energy; (7) meet the needs of the transportation disadvantaged by improving transportation services so as to strengthen the local and regional economy; (8) facilitate the flow of goods and services so as to strengthen the local and regional economy; and (9) conform with local and regional comprehensive land use plans. Each plan shall include a provision for transportation as a key facility.

Id.

C. The Acknowledgment Process.

Once the planning jurisdiction completes its inventory of uses, hazards, resources and other relevant data, has analyzed the information, and has drafted a comprehensive plan and imple-

menting regulations, it must receive LCDC's statement that the planning efforts comply with the goals. The LCDC action providing this approval is the "acknowledgment" order. Or. Rev. Stat. § 197.015(1) defines "acknowledgment" as:

> a commission order that certifies that a comprehensive plan and land use regulations, land use regulation or plan or regulation amendment complies with the goals.

LCDC acknowledgment review of local plans and regulations is controlled by Or. Rev. Stat. § 197.251. LCDC's review includes an opportunity for persons to prepare and submit written comments and objections to the pending request. Or. Rev. Stat. § 197.251(2)(a).[8] DLCD's director then conducts an investigation to resolve issues raised in the objections or by the director's independent review of the plan, and the director issues a report to the commission that provides the director's views as to whether the comprehensive plan and land use regulations are in compliance with the statewide goals. Or. Rev. Stat. § 197.251(2)(b). The sequence then provides an opportunity for the local government and persons who previously filed written comments or objections to the plan to file with LCDC written exceptions to the director's report. Or. Rev. Stat. § 197.251(3). LCDC considers the acknowledgment request on the basis of "the record of proceedings before the local government" together with all comments and exceptions to the request. Or. Rev. Stat. § 197.251(4). At the end of the process, LCDC issues an order

[8] Specifically, the statute requires that commission rules must provide "a reasonable opportunity for persons to prepare and to submit to the director written comments and objections to the acknowledgment request."

Or. Admin. R. 660-03-015 and 660-03-020 implement the statute. Or. Admin. R. 660-03-015 requires notice of the procedures and time limits for making comments or objections, as well as a list of the locations where relevant documents may be inspected by the general public.

granting, denying or continuing the acknowledgment request. In all cases, LCDC must make explicit findings explaining its decision. Or. Rev. Stat. § 197.251(5).[9]

"Acknowledgment" gives the comprehensive plan a position of primacy in the land use process. Until acknowledgment, every land use decision[10] made by a city or county must independently comply with every one of LCDC's statewide land use planning goals. After acknowledgment, however, the provisions of the plan (and implementing ordinances) effectively replace the statewide goals. As long as a particular decision is in compliance with a city's plan and regulations, the city's land use decision cannot be challenged under the goals and the city cannot be forced to defend the decision independently against each of the 19 standards.[11]

[9] LCDC also may grant acknowledgment for a specific geographical area. Or. Rev. Stat. § 197.251(6). That action effectively results in an incremental acknowledgment process, in which the commission grants acknowledgment bit by bit until the whole of the planning agency's effort is found to be in compliance with the goals.

LCDC also is authorized to continue the acknowledgment request. To do so, it issues a continuance order in which it must specify amendments or other actions that must be taken within a specified time for acknowledgment to occur. Or. Rev. Stat. § 197.251(12). LCDC may also grant a planning extension to a local government. The extension allows more time in which the local government may bring its plan and implementing regulations into compliance with the goals. Or. Rev. Stat. § 197.251(11).

[10] As applied to a local government, "land use decision" is any final decision or determination that concerns adoption, amendment or application of the goals, a comprehensive plan provision, a land use regulation, or a new land use regulation. Or. Rev. Stat. § 197.015(10). It includes such matters as subdivision approvals (the application of a land use regulation) and other land development decisions.

[11] Or. Rev. Stat. § 197.175(2); *Byrd v. Stringer*, 295 Or. 311, 318–19, 666 P.2d 1332 (1983).

D. Judicial Review and Subsequent Revision.

Citizens, businesses and other interested parties in disagreement with LCDC's action may seek relief through judicial review under the Oregon Administrative Procedure Act, Or. Rev. Stat. §§ 183.310 to 183.550.[12] The order therefore may be appealed to the Oregon Court of Appeals. The Court of Appeals' decision, in turn, is subject to discretionary review by the Oregon Supreme Court.[13]

The plan and its implementing measures are not frozen, but must be responsive to changes. Both Goal 2 and the statutory scheme[14] recognize that new factual information and changing needs will require revision to comprehensive plans and their implementing measures. Goal 2 therefore provides that plans and implementing measures must be reviewed and revised on a periodic basis "to take into account changing public policies and circumstances, in accord with a schedule set forth in the plan." Or. Admin. R. 660-15-000(2). The law further provides for "Post Acknowledgment" procedures in which changes to the plan

[12] Since 1983, LCDC orders are reviewable pursuant to the same procedures and standards that govern review in administrative "contested case" proceedings. 1983 Or. Laws Ch. 827 § 52. The relevant statute provides for judicial inquiry into the procedures used to issue a final order, whether the agency erroneously interpreted a provision of law, whether the agency acted outside the range of discretion delegated by law, whether the agency acted inconsistently with an officially stated agency position or prior practice (if the inconsistency is not explained), whether the agency acted in violation of a constitutional or statutory provision and whether the agency's order is not supported by substantial evidence in the record. Or. Rev. Stat. § 183.482.

[13] Or. Rev. Stat. § 183.482 (appeal to Court of Appeals) and § 2.520 (Supreme Court review). The right to judicial review includes a right to review of a limited acknowledgment order. Or. Rev. Stat. §§ 197.251(9) and (10).

[14] *See* Or. Rev. Stat. §§ 197.610 to 197.650.

are reviewed by LCDC to ensure continuing compliance with the goals. Judicial review is also available for post-acknowledgment orders. Or. Rev. Stat. § 197.650.

Finally, it is important to note that the availability of judicial review extends beyond the acknowledgment and post-acknowledgment process. Judicial appeals are available not only to challenge enactment of local land use comprehensive plans (together with implementing ordinances) and amendments to them, but also to test individual land use decisions taken under the plan and regulations. As to the latter, the initial jurisdiction for review of the land use decisions rests with the Land Use Board of Appeals (LUBA), a quasi-judicial administrative tribunal.[15] LUBA decisions in those cases are subject to judicial review. Or. Rev. Stat. §§ 197.805 to 197.860 controls both LUBA's review authority and judicial review of LUBA final orders.[16]

E. The Planning Process As Reflected In the City's Comprehensive Plan.

1. *Compliance with statewide goals.*

In compliance with the statewide standards set in the goals, the City of Tigard's comprehensive plan includes a discussion of

[15] Enforcing compliance with statewide standards is not dependent on the willingness of private parties to seek review in administrative or judicial forums. The State has independent authority to initiate proceedings that will ensure that plans and local land use decisions comply with the goals. Under Or. Rev. Stat. § 197.320, the agency may issue an order requiring a local government or other governmental body to take action necessary to bring its plan, regulations or other land use decisions into compliance with the goals.

[16] As the record in this case demonstrates, petitioner appealed the city's imposition of the exaction requirement to LUBA. LUBA's final opinion and order gave rise to the appeal in this case. In its review, LUBA tested the city's decision against the city's ordinances and statutory law, not against the goals.

its planning process and its citizen involvement program. Comp. Plan I, 1-15.[17] It also includes identification of flood and other hazards within its jurisdiction and a discussion of approaches used to cope with the problems associated with the identified hazards. *Id.*, at 20-24. Relevant to this case, the plan discusses the hydrology of the Fanno Creek area and it specifically includes a description of the history of damage caused by flooding in years past. *Id.*, at 54 *et seq*. Volume I of the city's plan also includes a bibliography of studies and other documents used to support the plan's discussion of facts about the city's environment and needs.[18]

In Volume II, the plan articulates the specific policies designed to address the city's various "Natural Features & Open Space," including flooding. The plan relies on detailed floodplain information from the U.S. Army Corps of Engineers and sets forth directives designed to control flooding in the Fanno Creek area. Plan policies include a prohibition on development or land form alterations in the floodway, except for those which preserve or enhance the maintenance of the "zero-foot rise floodway." *Id.* Where development is allowed in the 100-year floodplain outside of the zero-foot rise floodway, the city requires: (1) maintenance of the stream flow capacity of the zero-foot rise floodway; (2)

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[17] The city's acknowledged comprehensive plan was a part of the record during the LUBA proceedings. LUBA did not transmit the city's plan to the appellate courts. The plan is, however, a public document and an official part of the record in this case. If it is needed for this Court's review, the Oregon appellate courts undoubtedly would obtain and transmit it.

[18] The city's plan includes basic facts about the city, including its resources, hazards, services and other relevant information. It also includes a list of the sources used to gather these facts. *See* Comp. Plan, Vol. I, Resource Document, I-109-112; I-133. *See also* Master Drainage Plan 464G1-2.

documentation showing that there will be no detrimental upstream or downstream effects in the floodplain area; and (3) a buffer on commercial or industrial land abutting residential land that adequately screens the development from view by adjoining residential land and also provides a sound buffer. In addition, for development of property within the floodplain, the city requires:

> The dedication of open land area for greenway adjoining the floodplain including portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian bicycle pathway plan.

Id., at 15.[19] In effect, the plan requires denial of any development or land alteration that fails to advance the goal of reducing the recognized threat of flooding.

Significantly, the plan also states that flood levels in the city "will be substantially determined by the controls exercised over development outside the plan area, as well as inside Tigard's Planning Area." *Id.*, at 13. The city's plan therefore recognizes that flooding is affected by all activities along the floodway. Indeed, the plan states:

> The Fanno Creek drainage system includes numerous small water courses. The integrity of these natural drainageways is intrinsically connected to the system's capacity to absorb excessive runoff and on subsequent flood levels. Often, however, water courses are altered to provide more useable land. If alterations are done incorrectly, impacts can be adverse. If the impacts are adverse, they can be detrimental to the entire drainage system, i.e., the storage capacity of the water course is lessened and flooding occurs. In fact, in lower reaches,

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[19] Since 1983, Or. Rev. Stat. § 227.175(4) specifically has allowed cities to impose "such conditions as are authorized by * * * city legislation" in granting development permits. 1983 Or. Laws ch. 827, § 24.

> it is beneficial to have more water move through at a faster rate.

Id.[20]

The plan makes it incumbent on the applicant for development to provide the city with necessary information for making sound decisions. The applicant has the burden to show that a project will "not adversely affect the environment" or create undue future liabilities for the city. *Id.*, at 14.

The city's development code further implements these provisions, including the dedication requirement. The Tigard Community Development Code (CDC) addresses development adjacent to the 100-year floodplain. CDC § 18.120.180.A.8; *see also* § 18.84.040. It mandates dedication of sufficient open land area for greenway adjoining and within the floodplain. In addition, it requires that the dedication include area for construction of a pedestrian and bicycle pathway. *Id.*[21]

2. *The legal and factual bases for the conditions placed on petitioner's development.*

When petitioner approached the City of Tigard seeking approval to intensify the use of her property through an expansion of her business, the planning commission applied the comprehensive plan and development code to petitioner's request. The city planning commission's final order fully articulates the legal and factual basis for its decision to require the dedication of the easements on a portion of petitioner's property.

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[20] The plan specifically observes that the 1981 "Drainage Master Plan Study" prepared by the engineering firm of CH2M Hill, Inc. found that flood levels of two to four feet higher than the existing 100-year floodplain may be expected if no corrective measures are taken. *Id.*

[21] The city's brief contains additional discussion of the provisions of the plan and ordinance relating to the dedications. *See* Resp. Br. 6–12.

With respect to the dedication of the floodplain easement, the city's final order explained that the increased impervious surface accompanying the proposed development would be expected to increase the amount of storm water runoff from the site into Fanno Creek.

> The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, the Commission finds that the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site.

Pet. Cert., App. G-37.

The order further explained that modifications to the Fanno Creek channel were needed in order to improve its flow efficiency. The dedicated portion of petitioner's land serves to permit the city's construction of improvements necessary to control drainage. With the dedication, the channel improvements are possible; without it, they are not. As the order states, the improvements:

> would be expected to improve the channel's ability to transmit stormwater flows thereby reducing the 100 year flood elevation and reducing the possibility of floodwater damages and threats to public safety.

Pet. Cert., App. G-40. The city found that if the dedication were not required,

> the existing storm water drainage system would be affected because additional storm water runoff resulting from additional development both from the subject site

> and elsewhere within the Fanno Creek drainage basin, is expected to increase flow within the creek and [cause] a rise in the 100 year flood elevation without the public's ability to make channel modifications in this area to offset the increase in stream flow.

Pet. Cert., App. G-40.

With respect to the bicycle and pedestrian paths, the planning commission's order explained that a continuous pathway is imperative if the paths are to function as an efficient, convenient and safe transportation system. Pet. Cert., App. G-26. To omit a section of the pathway would conflict with the city's adopted policy of providing a continuous pathway system to serve the public needs as the use of the downtown business district intensifies. *Id*. The city determined that petitioner's expanded business would add to existing traffic problems and that the pathway would help alleviate that burden. Petitioner's expanded business was expected to generate an additional 400-plus trips per week. Pet. Cert., App. G-15. The city found that this additional vehicular traffic would

> increas[e] congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

Pet. Cert., App. G-24.

Moreover, the city found that petitioner's property likely would benefit from the pathway:

> It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs.

Id.

In sum, the city's comprehensive plan revealed a flood and drainage hazard and a need for bicycle/pedestrian pathways. The city's land use regulations addressed those needs and required the exactions as a means to enhance both flood control and local transportation. The petitioner's property is among those that were identified during the planning process both as giving a rise to the need for flood control and transportation-related easements, and as benefitting from the city's enhanced management of those public services. In addition, the commission's order includes its own discussion of the flood hazard created by Fanno Creek and need for improved transportation in the downtown business district. Finally, the order identifies petitioner's proposed intensified use of her property as aggravating those needs.

II. THE SIGNIFICANCE OF OREGON'S LAND USE PLANNING TO THE LEGAL ISSUES IN THIS CASE.

Amicus State of Oregon agrees with the basic legal analysis set out in the Oregon Supreme Court's opinion below and with the arguments advanced by the city in its brief on the merits. This brief does not duplicate those points, but instead supplements them with some additional observations about how Oregon's comprehensive planning process bears on the issues the Court must resolve.

Petitioner's application to expand her business development triggered the provisions of the city's comprehensive plan and ordinances that are addressed to intensified uses within the downtown business area bordering Fanno Creek. The hearings and orders that followed represent the implementation of an extensive land use planning effort, not an isolated or *ad hoc* land use decision. Petitioner's arguments nevertheless focus narrowly on the city's decision to condition her permit to intensify the development of her property, as though no study or planning

preceded it. Her claim is that the city's conditions are inadequately justified because the city did not impose them on the basis of a parcel-specific study of the precise impacts that her development would have on storm drainage, transportation and the other public needs served by the conditions. She then attacks the conditions as extortion or a subterfuge, claiming that because the city's code already required the conditions to be imposed, the decision to impose them was foregone and unrelated to any actual effects of the proposed development.

The State agrees with the city's central thesis that nothing in the Court's Takings Clause jurisprudence requires a *quid pro quo* between government and a property owner such that the conditions placed on development must be an exact, quantitative measure of the precise burdens the development will impose on legitimate public interests. *See generally* Resp. Br. 23–30. Rather, the appropriate inquiry is whether the development, alone or by reason of the cumulative impact produced in conjunction with other construction, would substantially impede a legitimate public interest, and whether the condition placed on the development serves to advance that *same* interest. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834–37 (1987). The significance of Oregon's land use planning process is that it provides the predicate nexus between the conditions placed on a development and the legitimate interests the conditions serve.

The entire land use planning program in place in Oregon is directed to a process that, by design, identifies the statewide public interests that all land use regulation should further. That effort leads to a set of planning goals that define Oregon's interests and then become the standards to which all land use plans and implementing regulations are held. Even in the abstract, flood control and protection from other hazards,

transportation and the delivery of public services would seem to be among the most obviously and intuitively legitimate interests a land use plan or decision could seek to serve. When those needs are identified and articulated through a formalized set of statewide land use planning goals, as they are in Oregon, their legitimacy cannot be doubted. Petitioner, not surprisingly, has never denied or challenged the legitimacy of flood control on Fanno Creek or the importance of the State's transportation goals.

The comprehensive planning process itself establishes a nexus in fact between the public's legitimate interests and the conditions placed on the development of petitioner's property. Before a comprehensive plan can become effective, it must be "acknowledged" and thereby reviewed and approved by an agency of statewide review authority. The acknowledgment process provides a significant measure of assurance that the comprehensive plan has adequately inventoried all property in the jurisdiction, that the plan accounts for the impacts of the present and future uses of the properties, and that the jurisdiction's plan is appropriately tailored to those impacts to the extent they implicate the statewide goals. The acknowledgment review additionally permits a full examination of the factual basis for the planning, and invites all interested citizens and businesses to be heard on the adequacy of the factual support for the plan and its proposed implementing regulations. In whatever terms the required nexus is described,[22] the comprehensive plan and acknowledgment

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[22] The State agrees with the city that petitioner's quarrel with the "standard" that the Oregon Supreme Court announced invokes linguistic formalism over meaningful analysis. *See* Resp. Br. 26 and n. 20. The test should be practical and should focus on a nexus in fact — that is, a causal connection that is actual.

process is sufficient to demonstrate, at least as a threshold proposition, the critical nexus between the impacts of a particular development and the conditions placed on that development.

In this case, therefore, the city should be entitled to rely on its comprehensive plan and ordinances as the basis to sustain the conditions, as long as petitioner's property and its proposed use are among those that the plan and ordinances identify as giving rise to transportation and storm drainage concerns. The city's plan and code set land use policies that are acknowledged to be in compliance with the statewide goals. The city's order explains why it is appropriate to apply the comprehensive plan and code provisions to petitioner's property. Specifically, the order explains that intensifying the use of petitioner's property will impede the city's efforts to provide adequate storm drainage and transportation facilities. It also explains that the dedication of a portion of petitioner's land (in the form of an easement) will advance those interests by enabling the city to make needed improvements to the storm drainage channel and to complete and maintain a bicycle/pedestrian pathway, which in turn will help alleviate traffic congestion in the downtown business district where petitioner's property is located. No more should be required of the city.

It may be an open question whether, and under what circumstances, a property owner is entitled to avoid exactions that have been imposed pursuant to extensive planning and study, as the city's have in this case.[23] This case, however, does not present

[23] For example, subdivision exactions, such as the construction of sidewalks or street improvements, easily meet even the most stringent requirement of a nexus between the development and the conditions placed on it. A city should be entitled to impose those conditions, even in the face of proof from a developer that the particular occupants of a subdivision will

(continued...)

that question. Assuming that there are such circumstances, the burden should be on the property owner to refute what the comprehensive plan otherwise establishes. Before petitioner could successfully claim that the city is unconstitutionally depriving her of a property interest, at a minimum she would have to demonstrate that the city's comprehensive plan wrongly includes her property within the class of properties that it has determined will burden its storm drainage and transportation networks if development on the property is intensified. The question is not presented here because petitioner had a full opportunity in this case to make that showing, but she declined it.

The opportunity was first available in the course of the comprehensive planning and acknowledgment process. Petitioner was fully entitled to challenge the city's plan and ordinance on the basis that development of her property did not implicate the city's transportation or storm drainage interests. She could have raised those claims first by presenting them to the city; she then could have submitted them to DLCD in the acknowledgment process; finally, she could have sought judicial review of the plan and challenged it on that basis.[24]

[23] (...continued)

not require sidewalks or street improvements. The purpose of such exactions, and the need for them, is not limited to a particular property owner's uses, but instead extends to the needs of the public who also will access the property, and the demands of future uses for which the property is suited.

[24] Petitioner owned and operated the plumbing business for many years prior to implementation of the 1973 comprehensive planning process in Oregon. Her interests and that of her business were entitled to full participation in the city's planning effort. Even if petitioner had not owned the business at that time, however, that opportunity would have been available to her predecessor in interest.

More important, in this case, the variance procedure petitioner invoked below would have permitted petitioner an effective opportunity to challenge the application of the plan and ordinances to her property. Had petitioner attempted to address the applicable variance criteria, she might have been able to convince the city that her property was uniquely situated and that her development proposal would not adversely affect drainage and other concerns reflected in the city code provisions requiring the dedication.[25] Not only did petitioner fail to establish that her property was uniquely situated from the others that the city had studied, she never even raised that claim. Her position below was that there was no set of circumstances under which the conditions could be constitutionally imposed. She asserted simply that she was entitled to a variance because to impose the conditions without compensating her would result in an unconstitutional taking of her property. As far as petitioner was concerned, the basis for the city's comprehensive plan and implementing regulations was wholly irrelevant.

Nothing in the Fifth Amendment Takings Clause requires such an irrational and wasteful result. Oregon has adopted a land use program that is a model of progressive planning.[26] That

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[25] Under the city's variance provisions, a variance may be allowed upon a showing that it will not be materially detrimental to the plan or to any applicable standards; that there are special circumstances peculiar to the property not common to other properties in the same zone; that the use proposed will be the same as permitted under the code and that city standards will be maintained to the greatest extent possible while permitting some economic use of the land; that physical and natural systems such as traffic and drainage will not be adversely affected; and that the hardship is not self-imposed. *See* CDC § 18.134.050.

[26] Oregon has gained national recognition as a frontrunner in land use planning and growth management. Its program has been extensively studied (continued...)

program builds in significant safeguards for the interests of affected citizens and businesses. The safeguards it offers are both substantive (statewide goals that must be complied with; plan provisions must be tailored to those goals) and procedural (citizen participation; factual basis for decision; opportunity for administrative and judicial challenge). Petitioner's argument effectively would treat the comprehensive plan and acknowledgment process as a nullity. It would require parcel-by-parcel reexamination of the impacts of development every time a city proposed to apply its plan and implementing regulations to a new or expanded use. That result would reduce land use controls in Oregon to a piecemeal rather than a comprehensive program and thereby frustrate planning efforts by rendering them less effective and prohibitively expensive. There is a serious question whether Oregon or any other State would continue or adopt comprehensive planning programs when those programs cannot be implemented on a comprehensive basis. *Amicus* State of Oregon

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[26] (...continued)

by experts and commentators in the land use field, and many other States have begun to implement features similar to Oregon's. The articles and texts discussing Oregon's leadership in the area are too numerous for citation. As representative examples, however, consult G. KNAPP & A. NELSON, THE REGULATED LANDSCAPE 1 (1992)("[Oregon] is nationally recognized as a leader in land use controls and offers a unique laboratory for examining the effects of statewide land use planning"); Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 ENVTL. L. REP. 10367, 10368 (1992)("Since 1985, a growing number of states have either adopted new statewide land use planning programs or fundamentally revised existing programs. * * * [Oregon] continues to provide lessons for states that implemented growth management programs in the 1980's"); Howe, *Growth Management in Oregon*, in GROWTH MANAGEMENT: THE PLANNING CHALLENGE OF THE 1990'S 61 (1993) ("Oregon is a nationally recognized pioneer in the development of growth management techniques").

respectfully submits that no principle embodied in the Takings Clause compels the result petitioner seeks.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

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In The

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October Term, 1993

FLORENCE DOLAN, *Petitioner,*

vs.

CITY OF TIGARD, *Respondent.*

On Writ of Certiorari To The
Oregon Supreme Court

BRIEF OF AMICUS CURIAE BROWARD COUNTY, FLORIDA, IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS CURIAE BROWARD COUNTY, FLORIDA, IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE

Broward County, Florida, a political subdivision of the state of Florida, is a local government charged with the responsibility of providing for the welfare of its citizens. This responsibility includes the requirement that Broward County make appropriate determinations as to what, if any, conditions should be imposed upon various uses of property located within its boundaries. This case is concerned with the standard to apply in making such determinations.

Because this brief is being submitted by the authorized law officer of a political subdivision of a state, consent for its filing by the parties is not necessary. Rules of the Supreme Court of the United States, Rule 37.5.

SUMMARY OF ARGUMENT

In order for a land use restriction to be valid it must substantially advance a substantial public purpose. The strength of the relationship between the condition imposed and the purpose it serves should not be viewed as an independent factor that must reach a certain level in order for the condition to be valid. Rather, as long as there exists a reasonable relationship between the condition and the purpose, the strength of the link should be viewed as a factor to consider in weighing governmental interests against private interests.

Under this approach, a more compelling connection might be required when the public purpose is substantial, but not of the highest order, or where the private interests are particularly strong. Conversely, a link of somewhat lesser strength might be sufficient when the governmental interest is of exceptional importance, when the interest is furthered in some unique or highly effective manner or when there is a minimal infringement of the private interests involved.

The fact that a public purpose must be substantial and that a condition must substantially further that purpose in no way means that the relationship between a condition and a purpose must itself also be "substantial." The contention that such a relationship should be required offers linguistic, but not logical, consistency. It calls for this Court to depart from its historic focus and to overemphasize one factor of the many that must be balanced in making appropriate decisions regarding land use.

The approach advocated by Broward County is consistent with the manner in which this Court has previously treated land use issues and allows for full consideration of the many variables inherent in determining such matters. It avoids locking governments and courts in the sort of rigid formula that this Court has consistently eschewed and provides a flexible approach that takes into account the needs, goals, concerns and realities of each particular locality.

ARGUMENT

WHEN A SUBSTANTIAL PUBLIC PURPOSE IS SUBSTANTIALLY FURTHERED BY A LAND USE RESTRICTION, THE EXISTENCE OF A REASONABLE RELATIONSHIP BETWEEN THE RESTRICTION AND THE PURPOSE CONSTITUTES A SUFFICIENT BASIS TO WEIGH THE GOVERNMENTAL AND PRIVATE INTERESTS, WITH THE STRENGTH OF THE RELATIONSHIP CONSTITUTING ONE FACTOR TO CONSIDER IN THE WEIGHING PROCESS.

Land use regulation effects a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). Thus, "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Penn Central Transp. Co. v. New York City*, 430 U.S. 104, 127 (1978). The determination of when property has been taken "necessarily requires a weighing of private and public interests." *Agins*, 447 U.S. at 261.

As noted in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court has not "elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies that the former 'substantially advance' the latter." *Id.* at 834 (footnote omitted).

This Court in *Nollan* concluded that a permit condition that serves the same legitimate police-power purpose as a refusal to issue a permit is not a taking if the refusal to issue the permit would not have constituted one. This evident constitutional propriety disappears, however, if the condition substituted for the prohibition "utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. When that is the case, the "essential nexus is eliminated." *Id.* Despite setting forth these principles, this Court in *Nollan* did not address the question of "how close a 'fit' " between the condition and

the governmental interest is required, finding the conditions in the case to be invalid under even the most untailored standards. *Id.* at 838.

Broward County suggests that when it is shown that a substantial public purpose is substantially furthered by a condition, it is appropriate to weigh the public and private interests if the condition is reasonably related to the governmental interest. The weighing process would then take into account the question of how substantial the relationship is under the facts of each particular case. Such a flexible standard would be consistent with the manner in which this Court has historically examined questions of this nature. It would also constitute a far more workable and realistic standard than the "substantially related" test urged by Petitioner, given the panoply of variables that are inherent in issues of this nature.

As discussed above, the focal points of this Court's pre-*Nollan* cases were the nature of the interest asserted and the question of whether that interest was furthered by the condition in question. Thus, this Court established the requirement that the interest be "substantial" and the requirement that it be "substantially" advanced.

The existence of these two "substantiality" requirements in no way means, or even implies, that the relationship between conditions and governmental interests must also be "substantial." Any argument to that effect would seem to be premised more on linguistic consistency than on precedent.

This Court's analysis has consistently demonstrated that when the government demonstrates that the two "substantiality" concerns are met, there exists a basis to warrant the balancing of the governmental versus the private interests. *See, e.g., Agins* (scenic zoning); *Penn Central* (landmark preservation); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (residential zoning). The strength of the nexus between the conditions and purposes has thus not constituted a separate criterion to be met by the government. Rather, it is a factor to consider in the weighing process, a process that determines whether a regulation "goes too far" and thus becomes "recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). It is a facet of the "character of the governmental action," one of the

appropriate considerations in determining whether a restriction improperly forces a property owner to bear a public burden which, in all fairness and justice, should be borne by the public as a whole. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

Such an analysis allows for the application of an appropriately flexible approach. When a governmental interest is substantial, but not of the highest order, when the interest is substantially furthered, but not as directly or effectively as possible, or when the private interest is particularly significant, a stronger link might be needed to uphold a condition. On the other hand, when a governmental interest is of exceptional importance, when the interest is furthered in some unique or highly effective manner, or when the private interest is minimal, a condition could be upheld when a link is of a somewhat lesser nature.

Clearly, when a condition "utterly fails" to further the governmental purpose, as in the example given in *Nollan* of a tax contribution of $100 in order to shout fire in a crowded theater, 483 U.S. at 837, there is no basis to trigger a weighing analysis. Requiring the existence of a substantial relationship, however, could create many unjust results in cases in which minimal infringements on private interests can result in extraordinary public benefits. Adoption of the analysis urged by Broward County allows for full consideration of all facts and circumstances and the opportunity for a just result in all cases.

This approach is consistent with the general principles that have been established by this Court with regard to governmental regulation of land use. There is "no precise rule," *Agins*, 447 U.S. at 260, to determine questions of this nature, because there is "no 'set formula to determine where regulation ends and taking begins.'" *McDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986), quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). Rather, such questions are treated as "turning upon the particular circumstances of each case," *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958), and resolution of each case "ultimately calls as much for the exercise of judgment as for the application of logic." *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

Perhaps the most basic concept that can be distilled from these authorities is that the Takings Clause of the Fifth Amendment "preserves governmental power to regulate, subject only to the dictates of ' " 'justice and fairness.' " ' *Id.*, quoting *Penn Central*, 438 at 124, and *Goldblatt*, 369 U.S. at 594. These dictates are not well served by treating the nexus between a restriction and the public interest as an independent hurdle that must be surmounted in the abstract, without consideration of the context in which a case arises. Rather, the promotion of justice and fairness requires that the strength of the nexus, assuming a reasonable relationship is shown, be assessed within the process of balancing the interests involved.

One of the restrictions involved in the present case, the requirement that a strip of land be dedicated for a pedestrian/bicycle pathway, provides a vehicle to demonstrate the variety of variables inherent in issues of the sort presented here and the resulting need for flexibility in considering the strength of the link between a public interest and a condition imposed by government.

A pathway that is part of a comprehensive transportation system, as in the present case, *Dolan v. City of Tigard*, 317 Or. 110, 116, 854 P.2d 437, 440 (1993), serves a more substantial public purpose than one that is for recreational use only. A pathway that serves as a key link between a residential area and a business district would likely be more significant than the most outlying arm of a transportation system. The importance of such a system in an area in which the weather allows it to be used by residents all year might be greater than that of a system in a location in which the pathways would annually be covered with snow and ice for months at a time.

Variables affect not just the strength of the public purpose, but also the impact on the property owner. One such variable would be the purpose for which the property is being used. If, for instance, the business involved in the present case was a fast food restaurant or a bicycle shop, rather than an electric and plumbing supply business, chances are that the pathway would have a positive effect on business. If, on the other hand, there was a private residence on the property, the resident's interest in privacy would be a highly significant factor to

take into account. Other variables might include the manner in which the portion of the property to be dedicated for the pathway could otherwise be used, the percent of the total area of the property that is encompassed by the dedication and the question of whether the pathway would cause problems for the business located there.

The impact of a proposed land use change also produces variables. Will the expansion of a business, as here, bring more customers to the area and thus increase the traffic flow? Will such an effect occur from an increased number of employees working at the expanded business? Will the number of deliveries to the business increase to provide inventory to fill the added space? How will any increased traffic impact on the safety of bicyclists and pedestrians that presently travel through the area despite the lack of a pathway?

The nature of the particular restriction would also be assessed in weighing the interests. Obviously, a requirement that property be actually conveyed would generally call for a stronger nexus than a less intrusive restriction. Further, the risk that such a requirement would be for the purpose of avoiding the payment of compensation would constitute a significant factor to consider, satisfying the concern expressed by this Court in *Nollan*. 483 U.S. at 841.

Only when the nexus question is viewed in the context of variables such as these can it be considered fairly and justly. The nexus when a pathway providing a vital link in a transportation system cuts across an unused back corner of property on which a hamburger stand is located should not have to be of the strength required when a pathway built for recreational purposes traverses the entire width of the front yard of a private residence. Thus, flexibility is a requisite for appropriate determinations by the courts. The sort of rigid standard advocated by Petitioner would force the nexus issue to be considered abstractly, without reference to the factors that are the key to its determination.

It should additionally be realized that only by the adoption of a flexible standard such as that advocated in this brief can governments make realistic decisions as to what restrictions are acceptable. Every community is unique and needs to be able to tailor its decisions to its

individual circumstances. Moreover, the ripple effects of land use decisions, effects which may not be immediate, but which may arise from an immediate effect, are matters best weighed by the local decision makers. Land use decisions must take into account the needs, goals and concerns of the particular locality. If governments are required to consider potential restrictions handcuffed by an antiseptic legal framework and divorced from the realities of their own circumstances, their determinations will carry the veneer of justice and fairness, but lack the soul of those concepts.

CONCLUSION

"The attempt to determine when regulation goes so far that it becomes, literally or figuratively, a 'taking' has been called the 'lawyer's equivalent of the physicist's hunt for the quark'." *Williamson Planning Commission v. Hamilton Bank*, 473 U. S. 172, 199, n. 17 (1985), citing C. Haar, Land-Use Planning 766 (3d ed 1976). This Court has consistently eschewed formula approaches to this search, *McDonald, Sommer & Frates; Agins; Penn Central; Goldblatt*, calling instead for an "exercise of judgment," *Andrus*, 444 U. S. at 65, governed only by the dictates of "justice and fairness." *Id.; Penn Central*, 438 U.S. at 124; *Goldblatt*, 369 U. S. at 594. In order to achieve these goals, courts and governments require the flexibility to include in the process of balancing the governmental and private interests the strength of the nexus between a land use restriction and its public purpose.

Justice and fairness are fragile concepts. When constructed in a vacuum, they can appear as substantial as a brick wall, but in the glare of reality they can turn out to be made of papier mâché. Requiring the nexus to be considered as an independent issue, rather than weighed along with all the variables that exist in a given case, is to take the chance that the wall of justice and fairness appearing from the sterile legal analysis may prove to be false. The weighing process, on the other hand, feels, prods, kicks, pokes and tests the wall. It determines what it is made of and substitutes brick when papier mâché is found.

In the present case, there clearly existed a reasonable relationship between conditions imposed and the substantial public purposes they served. The Oregon Supreme Court therefore properly rejected Petitioner's claim that a higher standard was required in order to weigh the governmental interests against the private interests. Its decision should be affirmed.

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IN THE
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FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

On Writ of Certiorari to the
Supreme Court of Oregon

BRIEF ON THE BICYCLE-PEDESTRIAN PATHWAY DEDICATION BY THE RAILS-TO-TRAILS CONSERVANCY, THE LEAGUE OF AMERICAN BICYCLISTS, THE BICYCLE FEDERATION OF OREGON, NATIONAL WILDLIFE FEDERATION, AND THE AMERICAN SOCIETY OF LANDSCAPE ARCHITECTS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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ARTICLES

Michael Everett, *Commuter Demand for Bicycle Transportation in the United States*, 28 Traffic Q. 585 (1974) 14, 15

David M. Eubanks, *From Abandoned Railways to Recreation Trails: Measurement of Community Impact*, Public Aff. 262 & 263 (1986) 16

BOOKS

Bicycle Inst. of Am., *Bicycling Reference Book* (1993-94) 14

Brian Puncochar & Peter Lagerwey, *Evaluation of the Burke-Gilman Trail's Effect on Property Values and Crime* (1987) 25

John Forester, *Bicycle Transportation* (1983) 17

Rivers & Trails Conserv. Assistance, National Park Serv., *Economic Impacts of Protecting Rivers, Trails and Greenway Corridors: A Resource Book* (1989) 16

MISCELLANEOUS

City of Tigard Parks Master Plans (1989) 10, 11, 24

City of Tigard Public Facilities Plan 10

City of Portland, Oregon, Bureau of Traffic Mgmt., *Bicycle Transportation Study: Central City Transportation Management Plan* (1993) 16

Federal Highway Admin., U.S. Dep't of Transp. Rep. No. FHWA-SA-9-0-005, *Evaluation of Travel Demand Management Measures to Relieve Congestion* (1990) 14, 16

Federal Highway Admin., U.S. Dep't of Transp., Pub. No. FHWA-PD-92-041, *National Bicycling and Walking Study Case Study No. 1: Reasons Why Bicycling and Walking Are and Are Not*

Being Used More Extensively As Travel Modes (1992) 15, 17

Federal Highway Admin., U.S. Dep't of Transp., Pub. No. FHWA-PD-93-012, *National Bicycling and Walking Study Case Study No. 9: Linking Bicycling/Pedestrian Facilities with Transit* (1993) 17

Federal Highway Admin., U.S. Dep't of Transp., Pub. No. FHWA-RD-92-073, *Selecting Roadway Design Treatments to Accommodate Bicycles* (1994) 17

Gilmore Research Group, *Gresham Transportation Choices Survey* (1993) 16

H.R. Rep. No. 584, 101st Cong., 2d Sess. 75 (July 10, 1990) 15

H.R. Conf. Rep. No. 892, 101st Cong., 2d Sess. 25 (Oct. 16, 1990) 15

League of American Wheelmen, *How to Promote Bicycling as an Air Pollution Solution* (1989) 19

National Park Serv., U.S. Dep't of the Interior, *The Impacts of Rail-Trails: A Study of Users and Nearby Property Owners from Three Trails* (1991) 25

1000 Friends of Oregon, 4A *The Pedestrian Environment* (1993) 15

Metropolitan Serv. Dist., Oregon Dep't of Envt'l Quality, *Control Strategy for Portland-Vancouver Interstate Air Quality Maintenance Area (AMQA) (Oregon Portion) State Implementation Plan Revision for Ozone* (1982) . . 20

Regional Transp. Plan (1992) 10

Sup. Ct. Rule 37 1

Tigard Compr. Plan (1982 as revised July 1993) . . . . . *passim*

Tigard Park Plan (1987) 6

U.S. Dep't of Commerce, *A Standard City Planning Enabling Act by the Advisory Committee on City Planning and Zoning Appointed by Secretary Hoover* (1928) 22

U.S. Dep't of Transp., *Moving America: New Directions, New Opportunities*, Feb. 1990 21

U.S. Envt'l Protection Agency, EPA-400/2-79-001, *Bicycling and Air Quality Information Document* (197915, 17

Washington County Compr. Framework Plan: Preliminary Draft (1982) 7

No. 93-518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

BRIEF ON THE BICYCLE-PEDESTRIAN PATHWAY DEDICATION BY THE RAILS-TO-TRAILS CONSERVANCY, THE LEAGUE OF AMERICAN BICYCLISTS, THE BICYCLE FEDERATION OF OREGON, NATIONAL WILDLIFE FEDERATION, AND THE AMERICAN SOCIETY OF LANDSCAPE ARCHITECTS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTERESTS OF THE AMICI CURIAE

Pursuant to Supreme Court Rule 37, we file this brief *amici curiae* in support of Respondent City of Tigard.*

* Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

The Rails-to-Trails Conservancy (RTC) is a nonprofit, public interest organization with a nationwide membership of 50,000, whose mission is to enhance America's communities and countrysides by connecting open space and abandoned railroad corridors into a nationwide network of public trails. RTC works to promote the integration of trails into a community's transportation infrastructure in order to provide critically needed and realistic non-motorized transportation alternatives.

The League of American Bicyclists, founded in 1880 as the League of American Wheelmen, is a national nonprofit membership organization comprised of more than 27,000 bicyclists and 500 affiliated clubs and advocacy organizations. The League works to educate the public about bicycling, and to promote greater recognition of bicycles as a legitimate, environmentally sustainable mode of transportation.

The Bicycle Federation of Oregon is a membership-based nonprofit representing more than 1,500 Oregon citizens, supporting bicycling and walking as viable transportation options for livable communities.

National Wildlife Federation (NWF) is the nation's largest, not-for-profit conservation education organization dedicated to the wise management of the world's natural resources. NWF has endorsed bicycle and pedestrian facilities to alleviate the pollution and traffic problems caused by the single-occupant automobile.

The American Society of Landscape Architects (ASLA) is a national professional society representing over 10,500 landscape architects in the United States and North

America. Founded in 1899 and representing a profession formally dating to the 1860's, ASLA supports the creation of linear systems -- of greenways and trails -- to relieve the stress of congestion on urban populations and to protect the environment and ecological systems.

SUMMARY OF THE ARGUMENT

In this case, a comprehensive and democratic planning process supports a modest transportation dedication sensibly designed to mitigate traffic congestion and air pollution caused by a major commercial redevelopment. These planning judgments, embodied in the City of Tigard's zoning ordinance, required that Petitioner dedicate a small, outlying segment of her 1.67 acre commercial site for use as a bicycle-pedestrian pathway, as a condition of approving her proposal to double the size of her existing store. The record below demonstrates that the modest dedication was necessary, factually supported by a lengthy and open comprehensive planning process, and in full accord with important national, state and local policies.

There is ample support in the unrebutted record below that the modest dedication by easement to Tigard's bicycle-pedestrian pathway system will address the traffic congestion and air pollution that Petitioner's proposed expansion would cause. This dedication is no different from the types of on-site transportation improvements routinely required of other commercial developers. Petitioner will also receive tangible benefits because her business will be more accessible and visible to current and potential customers who use the pathway.

Bicycle-pedestrian pathways have proven their effectiveness in addressing transportation needs of development, while mitigating the harmful impacts of an automobile-dependent transportation system. Their utility and importance have been expressly recognized by Congress in transportation and clean air laws. The need for such transportation facilities is particularly acute for communities such as Tigard, which are located in areas designated under the Clean Air Act as having failed to attain national ambient air quality standards for the hazardous pollutants emitted by motor vehicles.

This modest dedication would mitigate the uncontested traffic and air quality impacts that Petitioner's redevelopment would impose on Tigard, would provide tangible benefits to Petitioner's business and falls squarely within the mainstream of long-established principles of land use regulation.

STATEMENT OF THE CASE

I. THE BICYCLE-PEDESTRIAN PATHWAY DEDICATION REPRESENTS A MEASURED AND AMPLY SUPPORTED PLANNING DECISION, MODEST IN SCOPE AND RELATED IN KIND TO THE ANTICIPATED ADVERSE IMPACTS OF PETITIONER'S PROPOSED COMMERCIAL REDEVELOPMENT.

Petitioner's store is in the heart of downtown Tigard, on the eastern side of southwest Main Street, just north of one of the intersections of Main Street with Pacific Highway. The 1.67 acre property is bounded on its southwest by Fanno Creek, which winds through downtown. The site is currently occupied by one of Petitioner's chain of electrical and plumbing supply stores, with some 9,720 square feet under roof and a gravel parking lot. *See* Index & R., at 10, Dolan v. City of Tigard, LUBA No. 91-161 (Oct. 30, 1991). Petitioner's plans call for doubling the size of her store, paving a parking lot for 39 cars and three bicycles, and reserving the eastern section of the lot for additional future development. *See id.* at 11.

The dedication required of Petitioner for the bicycle-pedestrian pathway was the result of an open, democratic and broad-based comprehensive planning process. The bicycle-pedestrian pathway is an important element of Tigard's response to its transportation and air quality needs. The decision to impose such dedications (or similar ones) on those proposing major commercial redevelopment in the already congested downtown area constitutes a measured and

fully supported allocation of benefit and burden, each of whose factual premises are unrebutted by Petitioner.

A. Traffic Congestion Caused By Rapid Growth Has Strained Tigard's Transportation Infrastructure And Has Exacerbated Local And Regional Air Pollution.

Situated on the outskirts of Portland, the City of Tigard has more than quadrupled in population from 1970 to 1989. Tigard Compr. Plan I-142 (1982 as revised July 1993).[1] Tigard's Comprehensive Plan projected that from 1987 to 2000, Tigard's population would double to approximately 40,000 residents. *See id.* at Tigard Park Plan 1 fig. 1 (1987).

Increased commercial and retail activity both accompanied and fueled Tigard's rapid growth. According to the United States Department of Commerce, Tigard's

[1] Tigard's zoning ordinances and comprehensive plan are set forth by reference in the Land Use Board of Appeals (LUBA) Index and Record. Index & R., at iv, *Dolan*, LUBA No. 91-161 (Oct. 30, 1991). This Court, like the Oregon Courts below, may take judicial notice of the relevant zoning ordinances and comprehensive plans. *See* Or. Rev. Stat. § 40.090(7) (authorizing judicial notice of "[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom"); *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir.) (city ordinances are proper subjects for judicial notice), *cert. denied*, 434 U.S. 968 (1977); *Ruhs v. Pacific Power & Light*, 671 F.2d 1268, 1273 (10th Cir. 1982) (judicial notice of municipal ordinance permissible where a state statute specifically so provides). *See also* Tigard Community Dev. Code § 18.32.210 (authorizing zoning approval authorities to "take [judicial] notice of . . . [t]he comprehensive plan and other officially adopted plans, implementing ordinances, rules and regulations . . . .").

retail store sales totalled $197 million in 1987, *id.* at I-146, and, in general, have ranked in the top fifteen for all Oregon cities. *Id.* at I-147.

Tigard's increased population and commercial development have seriously strained the City's transportation infrastructure. *See id.* at I-221. Major congestion problems "have resulted from the rapid population growth since 1970." *Id.* at II-54. Main Street, where Petitioner's store is located, is often so congested with cars that emergency response time by fire vehicles is dangerously delayed. *See id.* at II-48. Main Street is designated as a Major Collector, feeding traffic onto and off Pacific Highway, an Arterial. *Id.* at I-226.[2] As with many of the Major Collectors in Tigard, Main Street, even in 1984, "inadequately service[s] both current and future traffic demands." *Id.* at I-221. It remains so today.

Pacific Highway, the major trafficway through downtown Tigard, which Main Street crosses near Petitioner's establishment, has the highest traffic volumes, congestion and accident rates within the City. *Id.* at I-236 to -245. Traffic counts measuring average daily traffic ("ADT") along Pacific Highway range from 19,400 to 39,500, *id.* at I-236, and actual ADT may be as high as 47,600. *Id.* at I-150. Pacific Highway is considered an unacceptable trafficway, with severe "congestion problems." *Id.* at I-243. Main Street has between 6,700 to 9,600 ADT. *Id.* at I-236. Traffic congestion in Tigard is at its worst in the immediate vicinity of Petitioner's store, at the

[2] *See* Washington County Compr. Framework Plan: Preliminary Draft at 3.7.3 to .5 (1982) (defining "Major Collector" and "Arterial").

intersection of Pacific Highway and Main Street. *Id.* at I-239 diagram IV.

Tigard's traffic-related congestion has contributed to severe regional air quality problems. *See id.* at I-118, II-22. Tigard is part of the Portland, Oregon-Vancouver, Washington metropolitan area, which has been designated by the United States Environmental Protection Agency as a nonattainment area under the Clean Air Act for carbon monoxide and ozone -- pollutants for which motorized vehicles are the primary source. 40 C.F.R. § 81.338 (1992).[3] The major source of air pollution in Tigard is automobile emissions. Tigard Compr. Plan II-22. Sources of such emissions were concentrated on Arterials, and on Major Collectors like Main Street in Tigard's downtown. *See id.*

B. Tigard's Comprehensive Plan And Implementing Ordinance Direct That Traffic Congestion And Traffic-Related Air Quality Problems Be Addressed, In Part, Through Alternate Transportation Systems, Including Pathways For Bicycles And Pedestrians.

The City of Tigard's Comprehensive Plan was developed in 1982 in response to planning mandates from the State of Oregon.[4] Tigard's planning process, while directly

[3] Under the Clean Air Act, a nonattainment area is "any area that does not meet . . . the national primary or secondary ambient air quality standard for the pollutant . . . ." 42 U.S.C. § 7407(d).

[4] *See* Or. Rev. Stat. § 197.175(2)(a) (requiring cities and counties to prepare and adopt comprehensive plans and regulations for land use in (continued...)

responsive to State imperatives, also drew upon extensive local community input through the participation of neighborhood planning organizations, residents, and business owners. A lengthy process of municipal debate and discussion culminated in the City Council's adoption of the Tigard Comprehensive Plan as binding land use policy. Tigard Compr. Plan I-6 to -8. The Plan was codified in provisions of the Community Development Code ("CDC"), including the requirement at issue here. Tigard City Ordinance Nos. 89-06, 83-52 (codified as amended at Tigard Community Dev. Code § 18.01.010 *et seq.*).

The Tigard Comprehensive Plan adopts several linked strategies to address the traffic congestion and air quality problems occasioned by Tigard's explosive growth. An emphasis on "modal shifting" -- the replacement of motor vehicle trips with the use of other types of transportation, including public transit, bicycling, and walking -- is a central feature of the Plan's transportation goals.[5]

[4](...continued)
accordance with state goals, established by the state Land Conservation and Development Commission. Or. Admin. R. § 660-15-000(12) (specifying that transportation plans "consider all modes of transportation including . . . bicycle and pedestrian [modes]").

[5] For example, the Plan seeks to route public transit through the City's high population areas in the downtown core. *See* Tigard Compr. Plan I-249 to -256. Linking public transit to high density areas is designed to "contribute to energy savings and less air pollution." *Id.* at I-254. Focusing public transit in the automobile-congested commercial center of the City is also designed to encourage "walking to adjacent commercial outlets (e.g., for groceries)." *Id.*

To facilitate these desirable modal shifts, the Tigard Comprehensive Plan adopted and incorporated Pedestrian-Bicycle Pathway and Parks Master plans. These master plans lay out a new transportation infrastructure consisting of an extensive network of pedestrian and bicycle pathways throughout Tigard. Tigard Compr. Plan at I-266 to -273; City of Tigard Parks Master Plans (1989).

The Pedestrian-Bicycle Pathway Plan was designed, among other criteria, to provide "safe access to schools, recreation areas, and *major shopping areas*." Tigard Compr. Plan I-267 (emphasis added). Construction of the networks is well under way. By the time the Plan was adopted, there were some 40 miles of sidewalks and bicycle-pedestrian pathways in Tigard. *See* City of Tigard Public Facilities Plan 12, 16. The City has since required numerous other dedicated easements, utilized its own parklands, has spent in excess of $800,000 on construction costs for the network of bicycle-pedestrian paths, and has planned for the investment of significantly more funds. *Id.*

Tigard's Comprehensive Plan places special emphasis on the downtown area, *see* Tigard Compr. Plan at I-268, where "[b]icycle and pedestrian pathway systems will result in some reduction of automobile trips within the community." *Id.* at I-221. In Portland, Tigard's hub city, which has a history of strong bicycle use, bicycling "has doubled in volume since 1974, and now accounts for almost 4 percent of all work trips -- more than double the national average." Regional Transp. Plan 1-12 (1992). The Pedestrian-Bicycle Pathway Plan provides for a bicycle and pedestrian pathway along the northern side of Fanno Creek Park, entering south Main Street at Petitioner's property, and linking up with branches reaching south to the Civic Center,

the Senior Center, and elsewhere in the City. *See* City of Tigard Parks Master Plans 10-11 fig. 2.

Tigard's Comprehensive Plan is implemented through the CDC, which ensures that all land use decisions on new development or major modifications of existing development are consistent with the Plan. The CDC directs the City to require, where appropriate, facilities to accommodate traffic and circulation needs generated by new development, consistent with the policies and goals in Tigard's Comprehensive Plan.

To promote public transit use, development proposals that are adjacent to existing or proposed transit routes are required to dedicate facilities for bus stops shelters, turnouts for buses, and connecting paths to the shelters, where appropriate. Tigard Community Dev. Code § 18.120.180.12. Other development proposals by virtue of their location, must provide "for pedestrianways [including sidewalks] and bicycleways if such facilities are shown on an adopted plan." *Id.* § 18.120.180.11.[6]

C. *During The Site-Development Review Process, Petitioner Did Not Rebut Any Of Tigard's Factual Findings Or Comprehensive Plan Determinations.*

The CDC provides a series of procedural requirements (and opportunities) for a landholder to seek a variance from a required dedication. *See* Tigard Community

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[6] *See also* Tigard Community Dev. Code §§ 18.120.180.A.8, 18.164.110.A. The CDC also requires one secure bicycle parking space for every fifteen required automobile spaces. *Id.* § 18.106.020.P.

Dev. Code §§ 18.134.010 to .070. These include the opportunity to demonstrate that circumstances have changed since the adoption of the Tigard Comprehensive Plan; that there are mistakes in the Plan or in the incorporated maps as they relate to a development; or that their application to a particular project would cause an undue or unnecessary hardship. *Id.* §§ 18.32.250.B, 18.134.010.A. An applicant for a variance must submit a traffic analysis of a proposed project. *See id.* § 18.164.030. The burden of proof is on the applicant for a variance, but the CDC provides that an incomplete application will be fully reviewed on the basis of available information. *Id.* § 18.32.060.

When her first redevelopment application was approved with dedication requirements functionally identical to those at suit here, Petitioner appealed to the Oregon Land Use Board of Appeals (LUBA). *Dolan v. City of Tigard*, 20 Or. LUBA 411 (1991). When the LUBA dismissed the appeal as unripe because no variance had been sought below, *id.* at 425-26; Pet. Cert. E-22, Petitioner filed the instant application.

Despite the CDC provisions requiring that a variance application be factually supported, Petitioner submitted only a one-paragraph statement averring that some of the required dedications constituted a "taking." Index & R., at 153, *Dolan*, LUBA No. 91-161. Petitioner has yet to meet the City on the factual merits of the dedication. No evidence has ever been presented by Petitioner to rebut the extensive factual findings of Tigard's Comprehensive Plan; none has been presented: (1) to show that her redeveloped facility will not add to Tigard's dangerous traffic congestion and related air pollution; (2) to challenge the documented planning determination that the bicycle-pedestrian pathway will help

alleviate development-induced traffic congestion and air pollution in the downtown area; or (3) to demonstrate that Petitioner, by virtue of her particular circumstances, would be unduly burdened by the dedication.

II. TIGARD'S DETERMINATION THAT A COMPREHENSIVE BICYCLE-PEDESTRIAN PATHWAY SYSTEM WILL REDUCE VEHICLE CONGESTION AND RESULTING AIR POLLUTION IS SUPPORTED BY FEDERAL TRANSPORTATION AND AIR QUALITY POLICIES AS WELL AS BY TRAFFIC ENGINEERING STUDIES.

The City of Tigard's determination that a bicycle-pedestrian pathway would address the traffic and air quality impacts of increased commercial development on the City's already congested Main Street is fully in accord with current traffic engineering studies. The effectiveness of bicycle-pedestrian pathway systems, like Tigard's, which are comprehensively planned and integrated into a community's overall transportation system, is well established. These transportation systems have also been explicitly endorsed by federal transportation and air quality policies, which now mandate the inclusion of bicycle-pedestrian facilities in state transportation planning. Most states rely, in part, on such facilities to meet their responsibilities for pollution control under the Clean Air Act.

A. Studies Directly Link The Existence Of Pedestrian-Bicycle Pathways To Reduction In Motor Vehicle Use And Improved Air Quality -- "If You Build It They Will Come."

"Travel demand management" studies confirm the reasonableness of Tigard's measured planning judgment to foster modal shifting in order to accommodate growth and new development.[7] The existence of a well-planned system of bicycle-pedestrian pathways will reduce motor vehicle trips and motor vehicle miles travelled. It is precisely such a system that Tigard has chosen to develop.

Almost 55 million Americans rode a bicycle in 1991, 31 million of whom did so regularly.[8] Bicycling is, on average, faster than driving a car or riding a bus for trips under three miles.[9] Over 60 percent of all automobile trips in the U.S. were five miles or less, accounting for 16 percent

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[7] Travel Demand Management ("TDM") is designed "to alleviate traffic problems through improved management of vehicle trip demand." Federal Highway Admin., U.S. Dep't of Transp., Rep. No. FHWA-SA-90-005, *Evaluation of Travel Demand Management Measures to Relieve Congestion* 1 (1990) [hereinafter *FHWA Evaluation of Travel Demand*]. It includes strategies such as transit, carpooling and provisions for walking and bicycling. *Id.* at 1-2.

[8] Bicycle Inst. of Am., *Bicycling Reference Book* 4 (1993-94).

[9] See Michael Everett, Commuter Demand for Bicycle Transportation in the United States, 28 Traffic Q. 585, 585 (1974).

of all vehicle miles travelled.[10] Bicycling and walking are particularly practical for short trips.[11]

Where facilities for cyclists and pedestrians are provided, use will rise. According to a Congressionally-mandated study, "cities with higher levels of bicycle commuting have on average 70% more bikeways per roadway mile and six times more bike lanes per arterial mile . . . ." Federal Highway Admin., U.S. Dep't of Transp., Pub. No. FHWA-PD-92-041, *National Bicycling and Walking Study Case Study No. 1: Reasons Why Bicycling and Walking Are and Are Not Being Used More Extensively As Travel Modes* 1 (1992) [hereinafter *FHWA Case Study No. 1*].[12] A recent study in nearby Portland, Oregon found that the "friendlier" the environment was to pedestrians (and bicyclists) the more people walked (and used bicycles).[13] Conversely, the absence of appropriate transportation

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[10] U.S. Envt'l Protection Agency, EPA-400/2-79-001, *Bicycling and Air Quality Information Document* 15 (1979) [hereinafter *Bicycling and Air Quality*].

[11] *See* Everett, *supra* at 600.

[12] The National Bicycling and Walking Study was commissioned by Congress in 1990 to assist the U.S. Department of Transportation in implementing national policy to accommodate bicycle and pedestrian needs in transportation planning and design. *See* H.R. Conf. Rep. No. 892, 101st Cong., 2d Sess. 25 (Oct. 16, 1990); H.R. Rep. No. 584, 101st Cong., 2d Sess. 75 (July 10, 1990).

[13] 1000 Friends of Oregon, 4A *The Pedestrian Environment* 3, 5, 17 tbl. 2, 18 fig. 4 (1993). Vehicle miles travelled and vehicle trips per household declined dramatically in the more pedestrian friendly environment. *Id.* at 25 tbl. 6, 26.

infrastructure is the greatest deterrent to utilitarian walking and bicycling.[14]

Providing a comprehensive bicycle-pedestrian system, including on and off-road accommodations that are integrated into the community's overall transportation and land use plan is demonstrably effective in encouraging bicycling or walking as a substitute for automobile trips. A 1986 study found that 7,000 commuters (14,000 during peak summer months) in the Chicago region bicycle to work every day, most of whom live near one of the five linear trails in the region.[15] In census zones with trails, an average of 15.6 percent of commuter trips are made by bicycle, compared to 1 percent for the region as a whole. *Resource Book*, *supra* at 6-6. Moreover, a Portland, Oregon study showed that in excess of 10 percent of bicycling in the center city was for shopping. City of Portland, Oregon, Bureau of Traffic Mgmt., *Bicycle Transportation Study: Central City Transportation Management Plan* 36 fig. 9 (1993). Likewise in Gresham, which, like Tigard, is located in the Portland Metropolitan Area, between 10 to 17 percent of residents did some shopping and errands by bicycle. Gilmore Research Group, *Gresham Transportation Choices Survey* 39 tbl. 13 (1993). Safe routes that provide linkages with shopping

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[14] *See FHWA* Evaluation of Travel Demand, *supra* at 28 ("If travelers are presented with no alternative that realistically competes with the private auto, they will not stop driving.").

[15] *See* Rivers & Trails Conserv. Assistance, National Park Serv., *Economic Impacts of Protecting Rivers, Trails and Greenway Corridors: A Resource Book* 6-6 (1989), *citing* David M. Eubanks, *From Abandoned Railways to Recreation Trails: Measurement of Community Impact*, Public Aff. 262 & 263 (1986) [hereinafter *Resource Book*].

areas and other key destinations persuade people to walk or bicycle rather than drive short distances. Utilitarian bicycling increases if bicycle-pedestrian facilities provide access comparable to that enjoyed by motorists. *See FHWA Case Study No. 1*, *supra* at 3.

The United States Department of Transportation recognizes as a matter of policy that increased motor vehicle traffic makes bicycling less safe and desirable, and that this should be alleviated by providing a higher degree of segregation between motorized vehicles and bicycles. *See* Federal Highway Admin., U.S. Dep't of Transp., Pub. No. FHWA-RD-92-073, *Selecting Roadway Design Treatments to Accommodate Bicycles* 14 (1994). Bicycle accident data consistently shows the hazards of intersections, and retail entrances and exits, to bicyclists. *Id.*; *see* John Forester, *Bicycle Transportation* 49-98 (1983). At the simplest level, Tigard is committed to improving conditions for bicyclists in the City, and the proposed retail expansion has the opposite effect. It is therefore appropriate to require a bicycle-pedestrian pathway exaction to alleviate this harm.

Bicycling and walking do not cause air pollution. Thus, "every bicycle [or walking] trip substitutes for auto travel [and] results in cleaner air." *Bicycling and Air Quality*, *supra* at xi. Because ambient concentrations of carbon monoxide (CO) are directly proportional to emissions, a five percent reduction in emissions would reduce ambient CO concentrations by five percent. *Id.* at 74. Moreover, bicycle and pedestrian trips substitute for short automobile trips, which create the most pollution since cold engines do not fire efficiently; "90 percent of . . . emissions occur in the first mile." Federal Highway Admin., U.S. Dep't of Transp., Pub. No. FHWA-PD-93-012, *National Bicycling*

and Walking Study Case Study No. 9: Linking Bicycle/Pedestrian Facilities with Transit 84 (1993). Accordingly, even a modest shift to bicycle or pedestrian trips yields disproportionate benefits in improved air quality.

These studies collectively support the City of Tigard's planning judgment that, given the traffic volumes on both Main Street and Pacific Highway (the Collector Street and Arterial directly serving Petitioner's store), an off-road pathway is necessary to allow customers and employees to walk or bicycle rather than drive to Petitioner's store. These studies also demonstrate that this pathway system will result in a modal shift that will accomplish the City's dual objective of relieving traffic congestion and improving air quality.

B. Federal Clean Air And Transportation Laws Recognize That Bicycle-Pedestrian Facilities Reduce Traffic Congestion And Improve Air Quality.

Federal air quality policies and transportation planning requirements unambiguously and directly support Tigard's determination that a bicycle-pedestrian pathway system would alleviate the traffic and air quality impacts of increased commercial development on the already congested Main Street. These policies recognize the close relationship between achieving federal air quality standards and modal shifting, and require that air quality be taken into account in transportation planning.

1. The Clean Air Act Specifically Endorses Bicycle-Pedestrian Transportation Strategies As Effective Means Of Attaining Federal Air Quality Standards.

The Clean Air Act establishes national ambient air quality standards; states not meeting these standards must comply with federally approved comprehensive State Implementation Plans ("SIPs") which enumerate strategies that will attain national air quality standards by a statutory deadline. 42 U.S.C. §§ 7401 *et seq*. The Clean Air Act explicitly recommends bicycle and pedestrian facilities as a "transportation control measure" for attaining national ambient air quality standards for ozone, carbon monoxide (CO) and particulate matter -- the pollutants for which motorized vehicles are a primary source. *Id*. § 7408(f).

The City of Tigard is in the Portland-Vancouver Interstate Air Quality Maintenance Area ("AMQA") which is nonattainment for both ozone and carbon monoxide and, thus, is subject to the Clean Air Act's directive to reduce pollution from mobile sources. 40 C.F.R. § 81.338 (1992). Transportation plans and programs in Tigard must conform to the nonattainment area's air quality implementation plans, 42 U.S.C. § 7506(c), and contribute to annual reductions of those pollutants. *Id.*; *see* 58 Fed. Reg. 62188 (1993).

Thirty-three states, including Oregon, have incorporated bicycle-pedestrian strategies as a reasonably achievable transportation control measure. League of American Wheelmen, *How to Promote Bicycling as an Air Pollution Solution* 3 (1989). The Oregon SIP for ozone in the Portland-Vancouver Interstate AQMA identified bicycling strategies as a high priority "transportation control measure"

for reducing hydrocarbon emissions -- an ozone precursor.[16] The SIP determined that, with attitudinal changes, between 14,000 and 44,000 work trips could be made daily by bicycle in 1987, reducing hydrocarbon emissions from 100 to 500 kilograms/day. *Portland-Vancouver Control Strategy*, supra at 31. Moreover, if seven percent of nonwork trips, such as shopping, were made by bicycle, there would be an additional emission reduction of 540 kilograms/day. *Id.* at 32.

2. *Federal Transportation Laws Require Consideration Of Alternative Transportation Modes, Including Bicycle-Pedestrian Strategies, In Order To Reduce Congestion And Conform With Federal Air Quality Directives.*

Likewise, the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"),[17] unequivocally committed the federal government to the proposition, long embraced by the City of Tigard, that "[i]t is in the national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner which will . . . minimize transportation-related fuel consumption and air pollution."

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[16] *See* Metropolitan Serv. Dist., Oregon Dep't of Envt'l Quality, *Control Strategy for Portland-Vancouver Interstate Air Quality Maintenance Area (AMQA) (Oregon Portion) State Implementation Plan Revision for Ozone* § 4.3, at 31-32 (1982) [hereinafter *Portland-Vancouver Control Strategy*].

[17] Pub. L. No. 102-240, 105 Stat. 1914 (codified as amended in sections of 23 and 49 U.S.C. and scattered sections of other titles of the U.S.C.).

23 U.S.C. § 134(a). Consistent with this principle, the Federal Highway Administration has determined that "[i]t is Federal transportation policy to . . . [p]romote increased use of bicycling, and encourage planners and engineers to accommodate bicycle and pedestrian needs in designing transportation facilities for urban and suburban areas." U.S. Dep't of Transp., *Moving America: New Directions, New Opportunities*, Feb. 1990, at 100.

ISTEA was enacted to promote development of a transportation system encompassing a variety of modes. 49 U.S.C. § 302. To implement this, ISTEA requires transportation planning organizations ("metropolitan planning organization" as defined under 49 App. U.S.C. § 1607(b)) to develop long-range transportation plans that include consideration of pedestrian walkways and bicycle transportation facilities, and requires states to include such facilities in statewide plans, as a condition of receiving federal transportation funding. 23 U.S.C. §§ 134(a), 135(a), (c).

Federal transportation laws also require transportation planners to conform their decisions to state and metropolitan air quality goals. *Id.* § 135(b). Metropolitan planning organizations in areas that have not attained national air quality standards for carbon monoxide and ozone must coordinate the development of their long-range transportation plans with transportation control measures adopted by the SIPs. 23 U.S.C. § 134(g)(3); 49 App. U.S.C. § 1607(g)(3). Because Tigard is within such an area, no federal funds may be made available to highway projects that will result in a significant increase in carrying capacity for single occupant vehicles, except in certain approved circumstances. 23 U.S.C. § 134(l).

III. THE TRANSPORTATION DEDICATION IS FULLY IN ACCORD WITH THE DECISIONS OF THIS COURT, AND FAIRLY ALLOCATES BENEFITS AND BURDENS.

Seventy-five years of planning law support the authority of local governments to condition new development approvals upon use restrictions, the payment of exactions and the furnishing of dedications to address the transportation needs, or mitigate the adverse public effects reasonably to be expected from the proposed developments.[18] *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-36 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-92 (1987); *City of Memphis v. Greene*, 451 U.S. 100, 126-29 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926). Because *Nollan*, however broadly read, is met on this record, the decision below should be affirmed.

Petitioner argues that, under *Nollan*, the bicycle-pedestrian dedication is a taking because the City cannot establish specific evidence that the bicycle-pedestrian path will address the traffic impacts of her new facility. *See* Pet'r Br. at 16-17. Even if this were a fair and accurate reading of *Nollan*, which it is not, the City's years of planning work and studies here have surely met that burden. The vehicular

[18] For instance, the Standard Planning Enabling Act, U.S. Dep't of Commerce, *A Standard City Planning Enabling Act by the Advisory Committee on City Planning and Zoning Appointed by Secretary Hoover* (1928), widely adopted throughout the United States, provided for the conditioning of subdivision plat approval on dedications and exactions to provide streets, water mains, sewer lines and other utilities.

traffic impacts of additional downtown development have been documented for more than a decade. *See* Tigard Compr. Plan I-236 to -240. These transportation impacts could hardly be disputed by Petitioner, since the success of her store and ultimately her redevelopment investment rests on an expectation of increased customer traffic.[19] In similar fashion, the utility of a mode-shifting dedication to address this anticipated traffic congestion is amply supported both by the comprehensive planning process in Tigard itself (*see* discussion *supra*, part II.A.) and by State and national policy imperatives. *Id.* at parts I, II.B, *supra*.

Petitioner suggests that the ordinance requiring dedication for a bicycle-pedestrian pathway system unfairly burdens riparian landowners with the full costs of this public improvement. Pet'r Br. at 14. Under Tigard's Comprehensive Plan, however, the burdens are shared by all developers, riparian and nonriparian alike. Each new development must accommodate transportation needs set forth in the plan in a manner appropriate to the location and nature of the development. Such burdens include dedications and exactions for sidewalks, bus turnouts, bus shelters and other measures to accommodate access to public transit where appropriate. Tigard Community Dev. Code §§ 18.164.070, 18.120.180.12. None of these were required of Petitioner. Because her expansion falls within the planned bicycle-pedestrian pathway, the City has determined that a modest dedication to create a segment of that pathway is an

[19] The record also provides evidence of the mathematical formula which the City used to assess the traffic impact of the new development. *See* Index & R., at 14, *Dolan*, LUBA No. 91-161.

appropriate transportation improvement to address the undisputed traffic impacts of Petitioner's enlarged store.[20]

Such dedication requirements fall squarely within long-established traditions of land use law. As Justices Scalia and O'Connor recently observed, "the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and *to dedicate certain areas to public streets*, are in accord with our constitutional traditions *because the proposed property use would otherwise be the cause of excessive congestion.*" *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (emphasis added).

Finally, Petitioner is likely to receive tangible benefits from the bicycle-pedestrian pathway system. As the Tigard Area Comprehensive Pedestrian-Bicycle Path and Tigard Parks Master plans make clear, the pathways were created in part to provide bicycle-pedestrian access to downtown commercial retail establishments. Tigard Compr. Plan I-267; City of Tigard Parks Master Plans 6.

The dedication will provide a competitive advantage to Petitioner by increasing both access to and visibility of her store by users of the pathway. This heightened exposure will increase the likelihood that users of the pathway will return

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[20] Petitioner's claim that her customers will not use a bicycle-pedestrian facility is not supported by the record. In fact, nothing in the record suggests that, like most electrical and plumbing retail stores, Petitioner's store does not carry a wide range of items ranging in size, weight and price. Moreover, Petitioner's redevelopment proposal anticipates additional commercial uses, which need not involve bulky items. *See* Index & R., at 11, *Dolan*, LUBA No. 91-161.

to shop (on foot, by bicycle or by motor vehicle) at Petitioner's store. There is good reason to believe that the bicycle parking spots will be used. Independent studies confirm that well designed and planned bikeways enhance the value of adjoining real estate, and can be a significant stimulus to the local economy.[21]

In any event, as this Court has held, it is not necessary to show with mathematical precision the balancing of impact and burden, and that the impacts of the development are "precisely calibrated to the use that a party makes of Government services." *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1990). To the contrary, "[l]egislation designed to promote the general welfare commonly burdens some more than others." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978). So long as there is an average reciprocity of benefits and burdens that result from the exaction, the courts will not be required "to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received in determining whether a 'taking' has occurred." *Sperry Corp.*,

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[21] *See, e.g.*, Brian Puncochar & Peter Lagerwey, *Evaluation of the Burke-Gilman Trail's Effect on Property Values nd Crime* 2 (1987) (pathways increase the value of adjoining properties); National Park Serv., U.S. Dep't of the Interior, *The Impacts of Rail-Trails: A Study of Users and Nearby Property Owners from Three Trails* 11 (1991) (total annual economic impact for each of three bicycle trails studied was a net gain of $1.2 million per trail).

493 U.S. at 61 n.7 (quoting *Keystone Bituminous Coal Ass'n*, 480 U.S. at 491 n.21).[22]

In short, the City of Tigard has complied with *Nollan*. Petitioner's refusal to contest such issues on the factual merits below implicitly concedes as much. This Court, we respectfully submit, should so hold and affirm.

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[22] Many post-*Nollan* cases confirm this. *See, e.g., Commercial Builders v. Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992) ("*Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question"); *Department of Transp. v. Lundberg*, 825 P.2d 641, 647 (Or.), *cert. denied*, 113 S. Ct. 467 (1992) (sidewalk dedication requirement serves the same legitimate governmental purpose that would justify denying permits to develop commercially zoned properties).

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court affirm the decision of the Supreme Court of Oregon below.

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OCTOBER TERM, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ of Certiorari to the Oregon Supreme Court

BRIEF OF THE STATE OF NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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No. 93-518

In the

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October Term, 1993

FLORENCE DOLAN,

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v.

CITY OF TIGARD,

Respondent.

On Writ of Certiorari to the Oregon Supreme Court

Brief of the State of New Jersey as Amicus Curiae in Support of the Respondent

INTEREST OF AMICUS CURIAE

This case implicates the constitutional latitude of State and local governments and planning authorities to implement comprehensive health and safety, land use planning and environmental programs for the public benefit in a flexible manner. Each of the Amici States currently implements comprehensive plans of this nature to protect the public health and safety and private and public resources. For example, the State of New Jersey implements comprehensive programs in order to manage development in its coastal region, Pine Barrens region, and freshwater wetlands.

These programs depend upon both general planning and the individual development approval processes to discourage development in environmentally sensitive areas, to encourage the preservation of open space, to steer development into areas with adequate infrastructure, and to help ensure public access to important public resources such as the waterfront. Government's need to address such impacts is particularly acute in states such as New Jersey, the country's most densely populated State. The devices used to promote these goals include conservation easements and dedications. Petitioner challenges the uncompensated use of those devices under the Takings Clause of the United States Constitution.

Comprehensive land use and environmental planning is critical to properly manage growth, to protect remaining natural resources, to reduce congestion on already overburdened streets and highways, to increase efficiency in the use and construction of infrastructure and to promote public access to public resources so as to preserve the public health, safety and quality of life. These comprehensive goals can be fairly and effectively achieved if governmental bodies are allowed to implement legislatively devised plans and solutions in a flexible manner. Achievement of these critically important goals will be thwarted, however, if individual development approvals are subject to an overly rigid judicial review process in takings litigation that focuses too extensively on site-specific findings and studies and too little on the recognized, cumulative impacts of development.

The Amici States strongly support the ability of governmental planning authorities to use the individual development approval process to implement comprehensive legislative plans which are rationally based on the documented, cumulative impacts of development. This ability can best be protected if such plans are accorded due deference in judicial review, but will be undermined if governmental authorities are required under the rubric of

takings law to justify with mathematical precision, solely on a site-specific basis, the actions taken on each individual development application.

For these reasons, Amici endorse the use of a test that recognizes the constitutional authority of elected representatives and their appointees to adopt reasonable regulations that protect public and private resources and that balances that authority with the rights of affected property owners. Use of such a test in takings litigation will appropriately recognize the importance of comprehensive, legislative plans and findings, while at the same time affording property owners an opportunity to show that an application of the general rules is not warranted for site-specific reasons.

STATEMENT OF THE CASE

Petitioner Florence Dolan contests two conditions contained within the City of Tigard's permit allowing her to replace an existing 9,700 square foot commercial retail business located in the downtown area with a 17,600 square foot building and to expand the building's parking lot. The first condition requires Dolan to dedicate that portion of her property lying within the floodplain for a storm drainage system and greenway. The second condition requires Dolan to dedicate an additional 15-foot strip of land adjacent to the floodplain for a pedestrian/bicycle path. The property affected by these dedications constitutes approximately ten percent of Dolan's 1.67 acre parcel.

The required dedications do not compel Dolan to construct the drainage improvements or path, but to allow the public to use those areas for those purposes. The floodplain located on the property is adjacent to Fanno Creek, a waterway whose drainage basin has experienced rapid urbanization over the past 30 years, resulting in a significant increase in stream flows during periods of

precipitation. In addition, the City of Tigard is located in an area which does not meet the federal air quality standards contained in the federal Clean Air Act, 42 U.S.C. §7401 et seq. That Act strongly encourages the use of alternative modes of transportation such as bicycles to meet clean air standards. See, e.g., 42 U.S.C. §7408(f)(1)(A)(vii), (ix), (x) and (xv).

The required dedications will in no way affect Dolan's ability to conduct or expand her existing retail business, but will allow increased public access to it. The dedications confer additional benefits on Dolan by protecting her property from flooding and by relieving her of any obligation to construct or maintain drainage improvements on the floodplain portion of her property or to widen the existing road in front of her building, even though she is effectively doubling the size of her existing retail development.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioner urges this Court to apply an "essential nexus" test to review the dedication conditions contained in her permit and argues that the dedications constitute a taking of her property because the City of Tigard did not meet such a test when it determined that her increased development would increase traffic and stormwater runoff. In petitioner's view, such an "essential nexus" can exist only if the dedications are required to address the impacts of her development alone, and cannot exist if the dedications are reasonably related to the impacts of her development but may also be needed to address the cumulative impacts of similar developments.

If petitioner's proferred standard were adopted, an unconstitutional taking could automatically be found in every instance where a governmental authority required a

dedication as part of a development approval, unless the authority established with mathematical precision the specific impacts of each individual development and correlated those impacts to the required dedication. Because this approach is not required by the Federal Constitution and would significantly undermine comprehensive planning efforts, eliminate important options in the approval process, and avoid the balancing of societal and individual interests that has been the hallmark of takings analysis, it should not be followed. Rather, this Court should adopt an approach that allows governmental authorities to rely on cumulative, legislative findings when imposing exactions and that places on the property owner the burden of showing why those legislative findings are not applicable to his development or why the exactions would pose an undue burden on his overall use of the property, once the government has shown a reasonable nexus between its legislative findings and the exaction.

Publicly elected representatives have long had the recognized authority to impose reasonable conditions on development to protect the public health, safety and welfare and to avoid any adverse impacts which would otherwise result from increased development. Penn Central Transportation Co. v. New York, 438 U.S. 104, 125-27 (1978). As part of this right, governmental entities often require subdivision developers to install streets, sewers, and other necessary infrastructure on-site and to then dedicate those improvements. These dedications are not ordinarily viewed as takings, but as reasonable exercises of the police power. In addition, the approving authority is not normally compelled to show the existence of a mathematically precise "essential nexus" to justify the dedications, because it is recognized that development itself spawns the need for the improvements. Cf. Pennell v. San Jose, 485 U.S. 1, 20 (1988)(Scalia, J., dissenting)(describing common zoning regulations regarding lot size, set-backs and street dedications as "within our constitutional traditions").

Similarly, federal and state authorities also enact and implement a variety of land use and environmental laws that protect the public health and welfare by restricting inappropriate development on the basis of comprehensive environmental concerns. Such laws are based on legislative findings that indicate that unrestricted development in or around environmentally sensitive areas will have known adverse impacts on a cumulative basis, and that to avoid these impacts, such development should be allowed only if explicit conditions and standards are met. As in the case of on-site infrastructure requirements, these legislatively-set standards and conditions are applied to individual property owners on a routine basis, without the need for the governmental entity to prove each time on a site-specific basis the general findings of environmental impact which caused the legislation to be enacted in the first place. Cf. United States v. Riverside Bayview Homes, 474 U.S. 121, 133-35 (1985) (discussing the general role which wetlands play in protecting overall water quality).

Neither existing constitutional law nor these longstanding and accepted practices support petitioner's position that an approving authority must show a mathematically precise nexus between a proposed development's impacts and an exaction, based solely on site-specific findings, in order to avoid a finding that an exaction contained within a development approval constitutes a taking. Rather, existing law requires that a regulatory land use scheme be substantially related to a legitimate governmental purpose, and that a reasonable nexus exist between a development's impacts and an exaction. Moreover, this case aptly illustrates the unnecessary burden that will be placed on governmental authorities if the takings test urged by petitioner is adopted.

In this matter, petitioner has been asked to dedicate a minor portion of her property located in and near a floodplain for storm drainage improvements and a

pedestrian/bikepath, as part of an approval that allows her to effectively double the commercial development of her property. Petitioner's development application never called for development within the area affected by the dedications. In addition, increased development is generally recognized to cause increased stormwater runoff and traffic, and the adverse effects of development in a floodplain are also well known. Consequently, New Jersey and other States typically impose significant restrictions on development in such an area. See, e.g., N.J.S.A. 58:16A-55.2 (forbidding construction within the 100-year floodplain unless those conditions prescribed "for preserving such area and providing for the flow of water therein to safeguard the public against danger" are met). These facts are appropriately reflected in the City's ordinances, which allow the dedications at issue to be required as a consequence of increased development.

Takings law as established by this Court does not provide that these exactions constitute a per se taking or require the City to show a mathematically precise relationship between the development and the dedications to avoid a taking. Rather, that law provides that for such an exaction to be imposed without constituting a taking, there must be a reasonable nexus between the impacts of the proposed development and the exactions. Nollan v. California Coastal Commission, 483 U.S. 831, 836 (1987). That nexus undoubtedly exists in this case. Thus, the Nollan decision requires affirmance of the Oregon Supreme Court's decision here.

In addition, takings law also provides for the use of a three-part balancing test on an ad hoc basis to evaluate whether specific governmental action takes private property for public use without just compensation by unduly interfering with an affected individual's property rights. Concrete Pipe and Products v. Construction Laborers Pension Trust, 113 S.Ct. 2264 (1993); Connolly v. Pension

Benefit Guaranty Corp., 475 U.S. 211 (1986). Application of that test would not result in a taking here, given the nature and scope of the exactions, the nature and existing use of the property, and the impacts of the exactions on petitioner's ability to conduct and expand her business.

Expanding takings principles to adopt petitioner's suggested approach would be inconsistent with the precedents of this Court and would impose an unwise, unnecessary and unworkable burden on governmental authorities responsible for regulating development on a comprehensive basis. Accordingly, petitioner's suggested standard should be rejected in a case such as this one, where an exaction is imposed as part of a comprehensive regulatory scheme that properly advances a legitimate governmental interest, the exaction reasonably advances that interest and does not unduly interfere with the property owner's plans and expectations, and the property owner has not demonstrated that the regulatory scheme cannot rationally be applied to her proposed development.

ARGUMENT

I. A Dedication Requirement Included Within a Development Approval Does Not Constitute a Per Se Taking or Require the Approving Authority to Establish the Need for the Dedication With Mathematical Precision on a Site-Specific Basis to Avoid a Taking.

A. A Dedication Requirement That is Reasonably Related to the Anticipated Impacts of Proposed Development and Does Not Excessively Interfere With the Property Owner's Reasonable Expectations or Viable Use of Property Does Not Constitute a Taking of Property.

This Court has frequently recognized the government's ability to use the police power to restrict or even preclude harmful development, and has stated that such regulation does not constitute a taking of property if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land. Penn Central Transportation Co. v. New York, 438 U.S. 104, 127 (1978). In addition, this Court has also recognized that because the government has the police power to prevent development that will cause adverse impacts without effecting a taking, it also has the power to condition approval of such development upon a concession of property rights that mitigates those impacts without causing a taking. Nollan v. California Coastal Commission, 483 U.S. 825, 831 (1987). Thus, this Court has explicitly rejected the notion that when a proposed development can be expected to have adverse effects the only option available to the government is to prohibit the development, and has instead recognized that in such an instance it is entirely permissible to condition development upon an exaction that will reduce the type of harmful effects that would otherwise be expected to flow from the development.

Petitioner acknowledges this precedent, but argues nevertheless that the imposition of an exaction automatically results in a taking unless the government provides explicit, site-specific findings directly relating the impacts of the proposed development to the exaction. Petitioner also suggests that an exaction constitutes a taking unless those

findings establish a nearly perfect fit between the impacts of the individual proposed development and the exaction.

Petitioner's analysis is clearly inconsistent with the government's authority under the police power to impose rational and reasonable conditions restricting development without the need for exact mathematical precision. Moreover, petitioner's approach is also at variance with Nollan and other takings precedents of this Court, because it fails to balance the rights of individual property owners with the governmental police power to protect the general health, safety and welfare.

In Nollan, this Court determined that as an alternative to disallowing development, the government could couple a development approval with an exaction designed to counteract the development's harmful effects. This Court then held that the exaction imposed in that case bore no relationship to the harmful effects of the development identified by the governmental authority, and that the exaction constituted a taking as a result. However, this Court did not hold in Nollan that a substantial relationship between the development's impact and an exaction was required, or that the government was obliged to show this relationship with mathematical precision or to limit its analysis strictly to the impacts of the development in question alone in order to avoid a taking. Cf. Jordan v. Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), appeal dism'd 385 U.S. 4 (1966); Collis v. Bloomington, 310 Minn. 5, 246 N.W.2d 19 (1976); Call v. West Jordan, 614 P.2d 1257 (Utah 1980); College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) (declining to use a strict proportionality test, and cited with approval in Nollan). Nor did this Court hold in Nollan that the burden of showing a relationship between the impacts of the development and the exaction should rest entirely and exclusively on the approving authority. Rather, this Court held that an exaction

that had no relationship to the development's impacts could not be imposed.

In addition, other decisions of this Court make it clear that to determine if a taking has occurred, a three-part test is generally employed, as opposed to the mathematically precise test which petitioner labels an "essential nexus" test. That three-part test examines the character of the governmental action, the economic impact of the governmental regulation, and the extent to which the regulation interferes with the reasonable, investment-backed expectations of the property owner to determine if a taking has occurred. Concrete Pipe and Products v. Construction Laborers Pension Trust, supra; Connolly v. Pension Benefit Guaranty Corp., supra. Petitioner's suggested approach to takings law ignores this test, which appropriately recognizes and seeks to balance individual and societal interests before determining if a taking has been effected by governmental action. However, abandonment of that test is not required under Nollan or any other decision of this Court and should not occur in an exactions case.

Petitioner's expansion of her existing commercial establishment will effectively double the development on her property. There is an obvious nexus between such an expansion and increased traffic; in fact, petitioner is clearly inviting and anticipating that increase by significantly enlarging her business and parking lot.

Similarly, there is an obvious nexus between a significant increase in the impervious surface of a site and an increase in stormwater runoff. That nexus is commonly recognized by both State and local governments and is

typically reflected in State and local land use regulations.[1] These regulations are adopted because it is well known that an increase in impervious surfaces will result in an increase in the volume and rate of stormwater runoff, which in turn increases erosion and degrades surface and groundwater quality.

Given these legislative facts, the nexus found lacking by this Court in Nollan clearly exists in this case and no taking has occurred on the basis of Nollan.[2] Accordingly, because that nexus exists, the challenged dedications should be examined under the three-part takings test used in Connolly and other cases to balance the societal interest advanced by the City's comprehensive plan against the burdens it imposes on the petitioner.

In addition, a taking has also not occurred here on the basis of the physical invasion standard that is contained in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Accordingly, that standard is likewise not applicable as a substitute for the three-part balancing test. In Loretto, this Court stated that a taking would generally be found where government caused the permanent physical occupation of private property, irrespective of other factors.

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[1]For example, New Jersey's coastal zone management rules require developers to use the best available technology to minimize stormwater runoff and to increase natural filtration, and prohibit development in sites subject to flooding if the development will increase peak run-off after storm events. N.J.A.C. 7:7E-8.7

[2]Petitioner has stated that the New Jersey Supreme Court misapplied the Nollan test in Bernardsville Quarry v. Bernardsville, 129 N.J. 221, 608 A.2d 1377 (1992). This statement is incorrect. Unlike Nollan, Bernardsville did not involve an exaction, but a restriction on property use. Moreover, in Bernardsville the New Jersey Supreme Court appropriately determined that the municipal quarrying ordinances challenged there substantially advanced legitimate state interests.

However, unlike this case, Loretto did not involve an exaction included within a development approval. Moreover, this Court also stated in Loretto that temporary public passage on property did not constitute a permanent physical occupation, and that the extent to which the property owner had exhibited an interest in excluding others should also be considered in the takings analysis. Loretto, 458 U.S. at 436. This Court recently conducted such an analysis in Yee v. Escondido, 112 S. Ct. 1522 (1992), and concluded that a rent control ordinance which restricted the owner's ability to exclude tenants did not effect a taking, based in part on the fact that the owner had voluntarily opened his property to others and could still exclude persons from his property if he converted it to another use. See also Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980))(a State regulation restricting the ability of the owner of a shopping mall to exclude others did not constitute a taking because the right of exclusion was not essential to the use or value of the property in question).

As in Yee and Prune Yard, the dedications required in this case also do not constitute a taking of property requiring abandonment of the three-part test. That test appropriately balances societal and individual interests and focuses on the overall economic impact that a regulatory scheme has on property use as well as on whether the nature of the governmental action is a physical intrusion or a regulatory restriction on property use.

The first factor examined in that test, the character of the governmental action, does not in this instance weigh heavily in the petitioner's favor, even though the dedications require petitioner to allow the public to use a small portion of her property for drainage and a pathway. Petitioner owns commercial property and conducts a retail business in the City's downtown. She invites the public onto her property every day and, unlike a residential owner, has no expectation of excluding the public. Thus, the economic

viability of her property is not dependent on the ability to exclude others, but is on the contrary contingent on the public's ability to gain access to the property. Accordingly, the requirement that petitioner dedicate a minor part of her property for a pedestrian/bikepath and stormwater drainage improvements cannot be said to constitute a taking on the basis of a right to exclude.

On the other hand, the two remaining parts of the three-part takings test weigh heavily against petitioner. The dedications will in no way reduce the economic viability of petitioner's use of her property, but may in fact enhance it by allowing more members of the public to reach the property and by making the property and downtown area as a whole more attractive to the public. This positive overall economic impact clearly reduces the merit of any claim that petitioner's property has been taken. Cf. Bauman v. Ross, 167 U.S. 548, 574-75 (1897) (stating that if a taking of a part of an individual's property increases the value of the remainder, that increase must be considered when setting compensation).

In addition, the dedications will also not cause any interference with petitioner's reasonable, investment-backed expectations. The dedications will in no way prevent petitioner from expanding or conducting her business, or affect its profitability in any way. Instead, the dedications may potentially increase that profitability, by protecting the property from flooding, relieving petitioner of any obligation to install or maintain drainage improvements, and allowing more members of the public to become aware of the business.

Based on these circumstances, the City is not taking petitioner's property by requiring the dedications, regardless of whether the dedications are necessitated solely by petitioner's development. The dedications affect a minor portion of the property and are similar to required

infrastructure dedications for sidewalks, streets, sewers and the like, which have traditionally been used to offset the undisputed impacts of development. Moreover, the dedications bear an obvious nexus to petitioner's development, and there is no constitutional requirement that this nexus be established with absolute mathematical precision. Finally, the dedications will in no way detrimentally affect petitioner's ability to use her property and will in no way detrimentally affect the profitability of petitioner's business. Instead, the dedications are likely to increase that profitability. Accordingly, the dedications do not take petitioner's property.

B. The Nexus Test Urged by Petitioner Should Not Be Adopted, Because It Does Not Recognize the Important Public Interest in Legislative, Comprehensive Planning to Protect Public Health and Safety.

In urging this Court to conclude that her property has been taken by virtue of the dedication requirements, petitioner argues that there is no precise nexus between the dedications and the impacts of her development, and that the City must show such a nexus to avoid a taking. However, this Court has never adopted this type of takings analysis, and if the three-part takings analysis that is ordinarily used were applied to this case, no taking would result. Moreover, this Court should reject petitioner's proferred takings test, because use of the test will seriously and unnecessarily undermine the ability of governmental authorities to implement comprehensive planning and environmental regulations.

The benefits of comprehensive land use planning and the detriments associated with a failure to plan are well known and have been recognized by this Court for many years. Agins v. Tiburon, 447 U.S. 255, 261-62 (1980); Penn

Central Transportation Co. v. New York, 438 U.S. 104, 129-30 (1978); Euclid v. Ambler Realty, 272 U.S. 365 (1926). Based on those benefits and on the fact that land use plans are normally the result of the legislative process, this Court and other courts have declined to subject such plans to mathematically precise review, and have instead only required that the plans be reasonably related to the achievement of a legitimate governmental interest. Euclid, 272 U.S. at 395. See also Jordan v. Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), appeal dism'd 385 U.S. 4 (1966); Collis v. Bloomington, 310 Minn. 5, 246 N.W.2d 19 (1976); Call v. West Jordan, 614 P.2d 1257 (Utah 1980); College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) (declining to use a strict proportionality test, and cited with approval in Nollan). Similarly, this Court has also never required an exact fit under takings law between the benefits received from regulation and the burdens imposed. Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 491 n.21 (1987). This approach rightfully allows comprehensive planning decisions to be made as part of the legislative process, and allows the plans to be implemented after adoption without a requirement for the implementing authority to justify the plans on a site-specific basis. Indeed, a requirement for this kind of justification would be inimical to the goal of comprehensive planning, which addresses the impacts of development in a cumulative fashion so as to avoid the well known problems associated with development that is haphazard and piecemeal.

Similarly, a wide variety of federal, state and local environmental laws also rely on the comprehensive planning process to prevent cumulative environmental degradation and to protect environmental resources. This reliance occurs, for example, in the Coastal Zone Management Act, 16 U.S.C. §1451 et seq., the Clean Water Act, 33 U.S.C. §1251 et seq., and the Clean Air Act, 42 U.S.C. §7401 et seq., all of which provide for state or local governments to adopt

comprehensive plans to protect natural resources and to improve environmental quality. These planning requirements stem from a realization that environmental problems can only be solved on a cumulative basis and that the environmental impacts of development and land use are best assessed on a cumulative basis. They reflect the fact that while the impacts associated with any individual development may be small or difficult to evaluate, information on the impacts of development as a whole is much more readily available and understood.

Petitioner's suggested approach to takings law completely ignores these facts and would require governmental authorities to make specific findings regarding a development's impacts even if general legislative findings linking the cumulative impacts of similar developments to any required exactions had already been made. However, this Court has in the past declined to require such findings, in deference to the legislative process. See, e.g., FW/PBS, Inc. v. Dallas, 110 S. Ct. 596, 610 (1990). Moreover, petitioner's approach is completely contrary to the presumption of validity that is generally accorded to legislation. Accordingly, that approach should be rejected and the ad hoc balancing test should be used instead, so long as there is a reasonable nexus between the development's impacts and the exaction. Use of that process will allow the government to rely on cumulative, legislative findings to support an exaction and will thus appropriately incorporate comprehensive legislative plans and recognize the critical importance of such planning.

C. Petitioner's Suggested Test Inappropriately Shifts the Entire Burden of Proof in a Takings Case to the Government.

Once a comprehensive plan is adopted through the public, legislative process, individual property owners are generally required to conform to it unless they can show

through a variance procedure that their proposed development will for some reason not have the impacts generally associated with the type of development they propose. Accordingly, the burden of proof to obtain a variance is typically placed on the developer, who must show why his development meets the requirements of the general scheme, or if it does not, why he should be excused from compliance with that scheme. Petitioner was afforded the opportunity to make such a showing in this case, but chose instead to assert that the burden was on the City.

Petitioner's proferred approach would turn traditional land use procedures on their head and place an undue and unnecessary burden on planning authorities to prove site by site the theories which were used to develop the plan in the first place. However, such an approach is not required by takings law, which ordinarily places the burden of showing a taking on the property owner. See, e.g., In re Egg Harbor Associates, 94 N.J. 358, 374, 464 A.2d 1115, 1123 (1983). In addition, after governmental authorities have enacted a comprehensive regulatory scheme through the public, legislative process, they should not have the burden of justifying that scheme over and over and site by site.

Moreover, it is extremely impractical to require that government establish the specific impacts of each development, particularly when those impacts involve complex ecological systems requiring extensive study. If petitioner's approach were adopted, governmental authorities could in many instances be put to an extremely costly and time-consuming task and would be unable to timely implement cumulative plans at specific sites. Thus, petitioner's approach would result in protracted litigation, an inability to implement the comprehensive plan as a whole, and in the haphazard and piecemeal development that the plan sought to avoid in the first place.

For these reasons, this Court should not accept petitioner's invitation to expand takings law by placing on governmental authorities the burden of justifying conditions placed in development approvals with precision on a site-specific basis. Instead, this Court should continue to allow authorities to use general legislative facts as justification and should, once the government has shown a reasonable nexus between those facts and the exaction, shift the burden of proof to the property owner to show that the nexus is not applicable to his development.

Such an approach will allow government to continue to address land use and environmental problems on a realistic cumulative basis and will afford due deference to legislatively crafted solutions to comprehensive problems. It will also continue to give individual property owners the ability to obtain relief through a variance procedure if they can show that the development they propose will not have the impacts generally associated with similar developments and if application of the comprehensive plan will have an unfairly onerous impact on their property as a whole and on their reasonable expectations.

For these reasons, the dedications included in Dolan's development approval do not violate the Takings Clause of the United States Constitution, as they are justified to advance rational legislation which protects the public health and safety and to abate the burdens caused by petitioner's development and similar developments.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1993

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Respondent.

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QUESTION PRESENTED

Whether a city may attach conditions to the development of a parcel of commercial property to accommodate increased water runoff and traffic congestion that will be caused by that development, without first proving that the conditions are closely calibrated to the amount of impact associated with the development.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States. This case raises fundamental questions about the constitutionality of land-use regulation, an area of vital interest to *amici*.

Local governments have historically conditioned the issuance of permits for development on the implementation of measures necessary to alleviate the burdens created by that development. Such conditions are an established

means of enabling government to ensure that the burdens on the community created by development are appropriately borne by the developers that create them rather than the citizenry at large.

The power of local governments to use conditions to make possible various public improvements necessitated by development has long been recognized. *See, e.g., Ridgefield Land Co. v. City of Detroit,* 217 N.W. 58, 59 (Mich. 1928) (upholding requirement that developer provide wider streets necessary to accommodate current traffic conditions); *Allen v. Stockwell,* 178 N.W. 27 (Mich. 1920) (upholding platting ordinance requiring developers to provide sanitary sewers, surface drains, sidewalks, and street grading); *Petterson v. City of Naperville,* 137 N.E.2d 371 (Ill. 1956) (upholding requirements for curbs, gutters, and storm water drainage); *City of Bellefontaine Neighbors v. J.J. Kelley Realty & Bldg. Co.,* 460 S.W.2d 298, 303 (Mo. Ct. App. 1970) ("The City may refuse to permit such subdivision development unless that expense [of streets] is borne by the subdivider."). *See also Pennell v. City of San Jose,* 485 U.S. 1, 20 (1988) (Scalia, J., concurring and dissenting) (noting that the existence of "the common zoning regulations requiring subdividers . . . to dedicate certain areas to public streets[] are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion").

The ability to condition development in this manner is integral to the functioning of local government in the critical area of land use regulation. Because the Court's decision will have a substantial effect on matters of great importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt Respondent's statement of the case.

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

SUMMARY OF ARGUMENT

1. The City of Tigard has conditioned Dolan's proposed intensification of development of downtown commercial property on the implementation of specific measures designed to mitigate two effects that unquestionably will flow from that development: increased water runoff and increased traffic. Without a doubt, the proposed conditions further the legitimate and important government interests in preventing flooding and traffic congestion. Dolan argues, however, that these development conditions represent an unconstitutional taking of her property, because the City has not proven a closely calibrated proportionality between the amount of increased runoff her development will cause and the amount that the City's flood control measures will accommodate, nor between the amount of increased traffic the development will generate and the amount that will be accommodated by the City's bicycle path.

Neither *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), nor any other decision of this Court requires such an outcome. On the contrary, *Nollan* reaffirmed that local governments may legitimately invoke their land-use powers to impose conditions on development, as well as to prohibit development entirely. *Id.* at 836-37. It was the absence of any direct relationship between the development conditions in *Nollan* and the burdens the Commission sought to address that resulted in the finding of a taking in that case. *See id.* at 838-39.

Because *Nollan* did not address a situation such as the one now before the Court, in which this cause-and-effect relationship is direct and undisputed, *Nollan* does not require reversal here. The question squarely presented in this case is one which the Court in *Nollan* did not have to reach—what degree of "fit" is constitutionally required between the condition imposed and the burden created by the development. *See id.* at 838. And even if *Nollan* had articulated the degree of proportionality required be-

tween development conditions and burdens, any pronouncements as to the degree of "fit" appropriate within *Nollan's* factual context would not be controlling here. The condition imposed in *Nollan*—a grant of public access across private residential property—is far more intrusive than the conditions at issue here, which are imposed upon downtown retail property that is already open to the public.

2. The question left open in *Nollan* as to the proper degree of fit should be answered here in a manner consistent with this Court's takings cases and with its jurisprudence in other areas involving the constitutionality of social and economic legislation. *Amici* submit that a rational relationship test strikes an appropriate and workable balance between the interests of property owners and the legitimate needs of government.

The proportionality test advocated by Dolan, in contrast, would place unworkable burdens on local governments in a manner inconsistent with this Court's traditional deference to governmental action. The takings analysis proposed by Dolan would erroneously shift the burden of proving a Takings Clause claim from the developer to the government. It would require a city that has articulated a rational relationship between development conditions and the unique burdens of development within a particular area to then prove that, with respect to a particular parcel of land, the conditions do nothing more than exactly offset the effects of the proposed development. Such an approach would unseat the traditional presumption of constitutionality and deference to municipalities' legitimate exercise of the police power.

Moreover, Dolan's novel and unwieldy test would require the City to demonstrate a degree of exactitude and precision between burdens and conditions that the Court has never before required of local governments and which is patently inappropriate here. Because land-use regulation depends on comprehensive planning to provide integrated solutions within a given area, and because property owners benefit not only from conditions imposed on their own property but from similar impositions on neighboring properties, a mathematical analysis conducted on a parcel-by-parcel basis is wholly inappropriate as a gauge of constitutionality. As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), and as the Court has reaffirmed on many occasions since, the Takings Clause is satisfied where a regulation provides "an average reciprocity of advantage." *See, e.g., Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting).

When the development conditions imposed on Dolan are analyzed in accordance with a rational relationship test, it is clear that no taking has been effected in this case. The City's development permit conditions do not single out Dolan to pay for public improvements or deprive her of desired economic uses of her land. Instead, the City has responsibly exercised its authority to regulate land use to counteract the consequences that would result from Dolan's proposed plan of development, in a manner that benefits Dolan as well as other citizens. This Court's cases do not require more.

ARGUMENT

I. *NOLLAN* DOES NOT CONTROL THE OUTCOME OF THIS CASE

This case presents the important question whether local governments have the power to accommodate the interests of private developers with concerns for flood control and the need for workable transportation systems, without first proving that the accommodation selected is directly proportionate to the specific impacts of development on individual parcels of property. Contrary to the assertions of Dolan and her *amici*, neither *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), nor any other decision rendered by the Court provides a basis for answering this question in the negative.

A. In This Case, Unlike *Nollan*, The Development Conditions Imposed By The City Directly Relate To The Burdens Created By The Proposed Development

Simply put, *Dolan* is not *Nollan*. In *Nollan*, the California Coastal Commission had conditioned its grant of permission to the owners of private beachfront property to rebuild their home on their transferring to the public an easement across their property. The Court found a taking in that case because it found no direct relationship between requiring the Nollans to transfer this "classic right-of-way easement" (*id.* at 832 n.1) as a condition of their receiving a building permit, and the public objective allegedly served by the condition. *See id.* at 838-39. The Court nevertheless reaffirmed that local governments may legitimately exercise their land-use powers to attach conditions to development permits, as well as to prohibit development altogether. *Id.* at 835-37.

The Court spelled out in *Nollan* the consequences of the absence of the "essential nexus" between the conditions imposed on a development permit and the stated governmental purposes. 483 U.S. at 837. There, the Court found it "quite impossible to understand" how the condition at issue—granting the public an easement across the Nollan's private beachfront property—would serve the asserted government purpose of "reduc[ing] obstacles to viewing the beach created by the new house." *Id.* at 838. In such a case, the "imposition of the permit condition cannot be treated as an exercise of [the Commission's] land-use power." *Id.* at 839. *Nollan*, therefore, specifies the outcome where there is no direct connection between the conditions a local government seeks to place on development and the land-use burdens created by that development. *See id.* at 838-39 ("there is *nothing* to" the Commission's argument that permit conditions were linked to limitations on beach access occasioned by the development) (emphasis added).

The *Nollan* Court did not, however, address the situation presented here, in which a direct relationship plainly

exists between the conditions imposed by the City and the burdens created by Dolan's proposed development. Without a doubt, increasing the impervious area of a site leads to increased runoff from that site. Likewise, increasing the intensity of commercial development leads to increased traffic. The question presented here is one that *Nollan* never broached—whether, where a nexus exists between a development's burden and the development conditions imposed on it, a mathematical relationship between the two must also be demonstrated, and, if so, what degree of proportionality is required. Indeed, the Court in *Nollan* "accept[ed] for purposes of discussion, the Commission's proposed test [a reasonable relationship test] as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailored standards." 483 U.S. at 838.

In short, *Nollan* decided an issue not presented here—the consequences of the complete absence of any direct relationship between development conditions and burdens. It did not reach the central issue in this case—what degree of calibration or "fit" between conditions and burdens is constitutionally required. For this fundamental reason, *Nollan* does not control the outcome in this case.

B. *Nollan* Involved An Easement For The Public Across Private Residential Beachfront Property And Did Not Address The Far Less Intrusive Development Conditions Presented In This Case

Even if the *Nollan* Court had decided the degree of "fit" that would be constitutionally required in the factual context before it, *Nollan* still would not control the outcome of this case. The permit conditions presented in this case are far less intrusive than the one at issue in *Nollan*. Consistent with other precedents, *Nollan* did not reach beyond the facts in the case before it to address the implications of less intrusive development conditions on downtown commercial property, such as those at issue here.

Nollan was decided within the context of one of the most intrusive permit conditions imaginable—a grant to the public of continuous, physical access across private residential property. *Cf. Kaiser Aetna v. United States,* 444 U.S. 164, 176 (1979) (noting unusually serious character of a "physical invasion" in context of navigational servitude upon privately-owned marina). The condition imposed in *Nollan* was thus a substantial interference with the Nollans' reasonable, investment-backed expectations for the use of their property. *See, e.g., Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust,* 113 S. Ct. 2264, 2291 (1993) (quoting *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211, 226 (1986)); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 495 (1987).

Here, in contrast to the private residential beachfront property that was involved in *Nollan,* Dolan owns commercial property located in the heart of downtown Tigard, onto which she has invited the public for her own economic gain. Because Dolan did not purchase the property with any expectation of excluding the public or of obtaining seclusion and solitude, the conditions placed on her development are far less intrusive than the one imposed in *Nollan.*

In the related context of physical invasions not tied to development permits, the Court has made it clear that the fact of a physical invasion is of significantly less import where the property, albeit privately owned, already is "open to the public at large." *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 83 (1980). In *PruneYard,* the Court distinguished *Kaiser Aetna* on the ground that the marina at issue in that case "was open only to fee-paying members, and the fees were paid in part to 'maintain the privacy and security of the pond.'" *Id.* at 84 (quoting *Kaiser Aetna,* 444 U.S. at 168). By contrast, in *PruneYard* the landowners had "open[ed the property] to the public for the purpose of encouraging the patronizing of [their] commercial establishments," *id.*

at 77, indicating that the "right to exclude others" was not essential "to the use or economic value of their property." *Id.* at 84. And in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), the Court distinguished *PruneYard* by relying in part on the fact that "the owner had not exhibited an interest in excluding all persons from the property." 458 U.S. at 434 (quoting *PruneYard,* 447 U.S. at 84).

Because the development conditions in this case are far less intrusive than the ones at issue in *Nollan,* the degree of fit that might be proper in a *Nollan* situation would not be controlling in this case. Since the Court in *Nollan* declined even to decide the proper degree of "fit" within the factual context before it, *Nollan* clearly does not provide any guidance as to the degree of "fit" applicable in the very different factual context presented here.

II. UNDER A PROPER ALLOCATION OF THE BURDEN OF PROOF AND THE CORRECT LEGAL STANDARD, THE CITY HAS NOT TAKEN DOLAN'S PROPERTY

The purpose behind the Takings Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960). This goal requires the Court to strike a balance between the protection of individual property interests and the need of government to function for the collective good:

> Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase.* "Government hardly could go on if to some extent values incident to property

> could not be diminished without paying for every such change in the general law."

Andrus v. Allard, 444 U.S. 51, 65 (1979) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). The right to use one's property as one chooses is not absolute. *See Nollan*, 483 U.S. at 834.

Dolan's argument that the permit conditions in this case constitute a taking consists of two parts. First, she argues that the City did not adequately prove that her development proposal warranted its decision to condition her building permit on the dedication of the greenway and the land for the pedestrian-bicycle path. This aspect of Dolan's argument raises issues relating to the burden of proof in a takings claim and the quantum of proof that satisfies it.

Second, Dolan maintains that there is an insufficient connection between the purpose of these exactions—mitigation of the impact of her development on the public health and safety—and the impacts themselves. She insists that the exactions must be strictly proportional to the impact of her development. Otherwise, she claims, the City is forcing her to bear the burden of general public improvements that are more properly the responsibility of government.

Both aspects of Dolan's argument misapprehend the process of land-use planning as well as the balance that the Takings Clause strikes between individual property interests and the obligation of government to act for the collective public good. First, she urges a constitutional rule that would shift to government the burden of proving, at the outset, the reasonableness of every decision to condition the issuance of a building permit. This is fundamentally inconsistent with this Court's cases that place the burden of proof squarely on those who challenge the constitutionality of social and economic legislation. *See FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101-02 (1993) (collecting cases). Second,

Dolan's rule would hold government to a novel and unwieldy standard of precision, which is likewise at odds with the Court's precedents which consistently require only a rational basis for social and economic legislation.

A. A Rational Relationship Test Strikes The Appropriate Balance Between The Protection Of Private Property Interests And The Need To Pursue Legitimate Government Objectives

1. *Dolan's Takings Clause Theory Erroneously Shifts The Burden of Proving Her Claim To the City*

Dolan's view of this case places the burden of proof—the burden of proving that a condition is *not* a taking—squarely upon the City. Notwithstanding her own failure even to attempt to prove that the conditions imposed by the City are unreasonable,[2] and notwithstanding the showing made by the City in the plans,[3] Dolan asks the Court to find a taking in this case simply because the City did not prove independently of its existing comprehensive land-use plan that her particular development plans necessitate the conditions.

As a legal matter, this allocation of the burden of proof would abruptly reverse the presumption of constitutionality that state and municipal legislative enactments traditionally enjoy. *See Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595-96 (1962).[4] Such a re-

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[2] Dolan did not provide the required information regarding drainage and traffic impact in her permit application, Respondent's Brief at 4-6, and has not ever brought forth any evidence even suggesting that the conditions overcompensate for the harms that her development will cause. *Id.* at 18.

[3] *Amici* refer to the City's Comprehensive Plan, *see* Respondent's Brief at 1 n.2, Master Drainage Plan, see *id.* at 6, and bicycle-pedestrian pathway plan, *see id.* at 11, collectively as "the plans." *See generally* briefs of *amici* State of Oregon and 1000 Friends of Oregon *et al.*

[4] *See also Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 (1992) (noting this Court's "usual assumption that the legis-

versal would indeed be a weighty step, as this presumption is soundly rooted in the democratic principle of separation of powers, which vests the right and duty to define the scope and means of implementing the public interest in legislative bodies rather than in courts. *See Berman v. Parker*, 348 U.S. 26, 32, 35-36 (1954); *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905). Deference to the judgments of local governments in the area of land-use regulation is of particular importance given the sensitive and complex determinations that such regulation demands. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979). Dolan thus seeks nothing less than a radical reversal of this traditional rule of deference.

To be sure, because the Takings Clause requires compensation when regulation "goes too far," the government must articulate a rational basis for imposing conditions upon a landowner's development of her property. As discussed in Part II.A.2, *infra*, municipalities generally do so through their comprehensive land-use plans and implementing ordinances. In Tigard this occurs during the

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lature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned") (citations omitted); *United States v. Sperry Corp.*, 493 U.S. 52, 62 (1989) (Court defers to legislative judgment in determining whether fee is a taking); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 134-35 (1978) (Court unwilling to reject judgment of city council that ordinance benefits members of the community economically and by improving quality of life); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like"); Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 Urb. Law 1, 12-13 (1992); Nicholas V. Morosoff, Note, *"'Take' My Beach, Please!": Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. Rev. 823, 860-61 (1989).

City's permit approval process: When the City approves, rejects or conditions an application, it must state the findings and conclusions on which it based its decision. *See* Tigard Community Dev. Code § 18.120.180A.

The Takings Clause, however, does not require the City to prove that the conditions it imposes are not unreasonable *each time* it seeks to condition a development permit. Rather, the landowner asserting a Takings Clause claim bears the burden of proving the City's exercise of the police power unreasonable. *See Goldblatt v. Town of Hempstead*, 369 U.S. at 596; *see also Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2909 (1992) (Blackmun, J., dissenting). This allocation of the burden is particularly appropriate where, as here, the City has expressly declared the purpose behind the condition.

> Given especially this specific declaration by Congress that the deductions are intended to reimburse costs incurred by the United States, the burden must lie with Sperry to demonstrate that the reality of [the statute] belies its express language before we conclude that the deductions are actually takings.

United States v. Sperry Corp., 493 U.S. at 60. Accordingly, the obligation was on Dolan to produce evidence that the permit conditions unfairly required her to shoulder a public burden, not on the City to show that they did not.

The practical consequences for government of the burden-shifting that Dolan advocates would be very substantial. As discussed in Part II.A.2, *infra*, Dolan's standard would require state and local governments to meet that burden with a degree of precision and exactitude never before required by the Court in this context.

2. *The Proportionality Demanded By Dolan Is At Odds With The Realities Of Comprehensive Land-Use Planning, As Well As With The Constitution*

Dolan's insistence on an individual analysis of development impact is at odds with the nature of land-use planning properly undertaken by the City and other localities. Contrary to Dolan's assumption, state and local governments do not conduct land-use planning on a parcel-by-parcel basis—they plan for the area as a whole, thus allowing for the " 'reciprocity of advantage' that Justice Holmes referred to in *Pennsylvania Coal.*" *Keystone,* 480 U.S. at 491. *See Agins v. City of Tiburon,* 447 U.S. 255, 262 (1980) ("There is no indication that the appellants' 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power."); *Penn Central,* 438 U.S. at 133-35; *id.* at 147 (Rehnquist, J., dissenting); *Berman v. Parker,* 348 U.S. 26, 29, 34 (1954) (holding that it is permissible to "attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis"); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. at 388; Charles M. Haar, "*In Accordance With A Comprehensive Plan,*" 68 Harv. L. Rev. 1154, 1155 (1955).

Oregon municipalities in particular have long regulated land-use through comprehensive plans, like the City's. *See Fasano v. Board of County Comm'rs,* 507 P.2d 23, 27 (Or. 1970). The focus of comprehensive plans and the resulting land-use ordinances and regulations—which are, at bottom, an exercise of the municipality's police power—is to provide integrated solutions to municipal land use problems. Municipalities carry out these plans through ordinances, such as the dedication ordinance at

issue in this case. *See id.* Such comprehensive planning is tailored to anticipate and remedy the problems posed by specific kinds of development in specific areas. As the Court observed in *Berman*:

> [I]t is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building.

348 U.S. at 35.

a. *The City Anticipated The Impact Of Dolan's Development In Its Comprehensive Land-Use Plans*

Although the City did not commission an independent study of the specific impact that Dolan's proposed development would have on Fanno Creek and downtown traffic congestion, the substantial drainage and traffic studies underlying the plans anticipated the impact of her proposed development and provided a necessary and integrated response to it. Because the City based the ordinances requiring the condition upon this comprehensive planning process, it is entitled to rely on those findings and conclusions to demonstrate the rational basis for the permit conditions.

The City and other *amici* describe in considerable detail the history of land-use planning in the City and in Oregon generally, the statutory underpinnings of the City's planning process, the studies and planning undertaken by the City and the resulting plans and enacting

ordinances. *See* Resp. Br. at 1-13; *see* also Br. *Am. Cur.* 1000 Friends of Oregon/APA at 4-12. As these descriptions make clear, the City based its judgments regarding the threat of flooding and traffic congestion on a thorough understanding of the land itself and of usage patterns in the area as a whole, not on a piecemeal assessment of individual parcels. "This interference with . . . propety rights . . . arises from a public program that adjusts the benefits and burdens of economic life to promote the common good, and, under our cases, does not constitute a taking requiring Government compensation.'" *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust,* 113 S. Ct. 2264, 2290 (1993) (quoting *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986)).

Dolan's takings claim overlooks the individual and collective advantages of comprehensive land-use planning. Her lot is not the only one affected by Fanno Creek; likewise, not only do she and the public benefit as the conditions mitigate the impact of her development, but she benefits as well (along with the public) when the plans apply the same conditions to her neighbors. Like zoning, the plans map out the City's overall plan for combatting this and other problems on a City-wide scale and apportion the benefits and burdens of its flood and traffic control strategy within each area. *See Agins,* 447 U.S. at 262. It was rational for the City to conclude that the public interest in protecting against the dangers of flooding and traffic congestion requires property owners in the area to dedicate land to ameliorate the increased harms caused by new development.

Far from burdening individual landowners with the costs of solving collective land-use problems, the plans, which Dolan characterizes disparagingly as "long-standing plan[s]" to acquire property for public improvements at no cost, Petitioner's Brief at 16, serve to avoid the singling out of Dolan or any other City property owner to bear

unfair public burdens. *See Penn Central,* 438 U.S. at 132 (historic preservation ordinance was comprehensive plan to preserve structures of historic and aesthetic importance and thus survived takings challenge). Moreover, the plans embody the degree of study and careful planning consistent with the City's obligations under the Takings Clause. Accordingly, when the plans call for the imposition of a particular condition on a particular parcel of property, the City cannot be liable for a taking unless Dolan proves that the condition requires her to bear an unreasonable public burden.

b. *The Constitution Does Not Mandate Stringent Proportionality Between Burden And Condition*

Development permit conditions are extremely important to state and local governments' ability to regulate growth and development in the public interest.[5] Without them, government would be deprived of an effective means of redressing social costs that would otherwise result from development. This case presents a characteristic example.[6] The plans and the studies underlying them

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[5] *See, e.g.*, Nicholas V. Morosoff, Note, *"'Take' My Beach, Please!": Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions,* 69 B.U. L. Rev. 823, 847-50 (1989); Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices,* 50 Law & Contemp. Probs. 51, 55-68 (1987).

[6] A wide variety of development conditions and use restrictions have been upheld by lower federal courts since *Nollan*. *See, e.g., Outdoor Sys., Inc. v. City of Mesa,* 997 F.2d 604, 611, 616 (9th Cir. 1993) (removal of billboards); *Commercial Builders v. Sacramento,* 941 F.2d 872, 874-75 (9th Cir. 1991) (permit fee to fund construction of low-income housing), *cert. denied,* 112 S. Ct. 1997 (1992); *Leroy Land Dev. v. Tahoe Regional Planning Agency,* 939 F.2d 696, 699 (9th Cir. 1991) (off-site conditions designed to mitigate environmental impact); *St. Bartholemew's Church v. City of New York,* 914 F.2d 348, 357 n.6 (2d Cir. 1990) (denial of application to demolish building designated as landmark), *cert. denied,* 499 U.S. 905 (1991); *Naegele Outdoor Advertising, Inc. v.*

amply demonstrate that development along Fanno Creek increases the likelihood that it will flood, causing harm to numerous property owners and indirectly taxing the City as a whole. Resp. Br. at 6-10. Similarly, the City projected that development in the central business district would measurably increase traffic, congesting roads and jeopardizing access by emergency vehicles. *Id.* at 10-12. These impacts lead logically, indeed, ineluctably, to the permit conditions that the City imposed in this case. It is impracticable, if not impossible, to measure either the extent of the impact or the efficacy of the conditions with pinpoint accuracy. However, municipalities are entitled to require conditions like these, which bear "a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy," and do not impose unfair public burdens on individual landowners. *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring and dissenting).

As Justice Scalia noted in *Pennell*, "regulations requiring subdividers . . . to dedicate certain areas to public streets[] are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion." *Id.* at 20. Tigard's requirements that Dolan dedicate a portion of her land for a bikepath to reduce traffic congestion and land in a floodplain to address the harm caused by the increase in the impervious surface area of her new store, certainly satisfy the "cause and effect relationship" between the social evil and the regulation identified by Justice Scalia. The exactions are therefore well within the traditional exercises of land-use regulation which are non-compensable under the Takings Clause.

City of Durham, 844 F.2d 172, 178 (4th Cir. 1988) (retroactive ban on billboards); *Pengilly v. Multnomah County*, 810 F. Supp. 1111, 1113 (D. Or. 1992) (dedication of right-of-way space for widening road); *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 606-07 (M.D. Fla. 1989) (denial of permit for beach construction).

Moreover, regardless of whether Tigard's conditions comport with the tradition of non-compensable land-use regulations, the fact remains that Dolan receives a tangible benefit from the City's floodplain regulation and bikepath development. In the regulatory takings context, the Court has never held that the Takings Clause requires mathematical exactitude between the costs and benefits of a particular regulation. Rather, the Court has recognized:

> The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

Keystone, 480 U.S. at 491 n.21. Similarly, in *United States v. Sperry Corp.*, the Court rejected a takings challenge brought by American claimants who had prevailed in proceedings before the Iran-United States Claims Tribunal against the government's automatic 1½% deduction from their awards:

> This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a "fair approximation of the cost of benefits supplied."

493 U.S. at 60 (quoting *Commonwealth of Massachusetts v. United States*, 435 U.S. 444, 463 n.19 (1978)). *See also Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 967 F.2d 648, 654 (D.C. Cir. 1992) ("As long as the amount taken is 'a fair approximation of the cost of the benefits supplied,' additional compensation is not required." (citations omitted).

Furthermore, because land-use regulations imposed on individual pieces of property provide reciprocal benefits to neighboring properties within the area, the Constitution does not require development conditions to be calibrated to development burdens on a structure-by-structure basis. As Justice Holmes stated in *Pennsylvania Coal,* as long as a regulation provides "an average reciprocity of advantage," it satisfies the Takings Clause. 260 U.S. at 415. *See also Penn Central,* 438 U.S. at 139-40 (Rehnquist, J., dissenting) ("any such abstract decrease in value [from a zoning restriction on land use] will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties"). Here, requiring the City to prove with exactitude the precise amount of additional runoff and traffic congestion that Dolan's development would generate and limiting development conditions to a precise mathematical offset of those impacts would fail to take into account the fact that Dolan's property is not hermetically sealed from the surrounding world. Instead, it is entirely proper for the City to impose flood and traffic control measures on Dolan's property that have positive spillover effects on surrounding properties, because similar impositions on those surrounding properties will reciprocally benefit her.

Apart from its lack of respect for and deference to local government, a constitutional rule requiring a tight mathematical fit between impact and condition also would impose tremendous burdens on the judiciary. The uncertainty in determining whether, under the facts of a particular development proposal, the conditions fit closely enough would undoubtedly force more land-use controversies into the courts. Not only would this needlessly burden the courts with cumbersome, fact-intensive inquiries,[7] thus turning them into super planning boards, but

[7] Indeed, this Court has repeatedly recognized the difficulty in fashioning a concrete rule to govern Takings Clause claims and has acknowledged that "[r]esolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic." *Andrus,* 444 U.S. at 65. *See also MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 349 (1986); *Connolly,* 475 U.S. at 224; *Penn Central,* 438 U.S. at 123-24.

it can only delay developers' own efforts to obtain development permits. Such a result defies not only the Constitution but also common sense.

B. The Permit Conditions Required By The City Do Not Take Dolan's Property

1. *The City Demonstrated The Reasonableness Of The Conditions Through Its Comprehensive Plans And Dolan Did Not Attempt To Rebut That Showing*

The City demonstrated the reasonableness of the conditions in its comprehensive plans. The City's brief, Resp. Br. 1-13, explains in detail the legislation underlying the City's land-use planning efforts, the studies it undertook, the findings and conclusions resulting from those studies, the City ordinances resulting from those conclusions and the planning needs they identified. *See also* 1000 Friends Br. 4-12. Without repeating those descriptions, *amici* respectfully submit that they compel the conclusion that there was a rational relationship between Dolan's proposed development and the conditions imposed by the City.

The City's permit conditions address directly the public health and safety issues identified by the City. Dolan seeks to increase significantly the amount of impervious surface on her land, which directly affects the flow of rainfall into Fanno Creek. Resp. Br. at 7, 14. She also seeks to increase the square footage of retail space on her land by more than 80 percent in this phase of the development alone, Pet. Br. at 3,[8] which foreseeably increases the

[8] Dolan apparently plans a second phase of development on her property that will include additional retail space. Resp. Br. at 1.

amount of traffic flowing in and through the central business district. Resp. Br. at 10-12. The City's drainage and transportation studies project a measurable impact on the City's resources, natural and infrastructural, from this development, and the City made extensive findings to that effect in ruling on Dolan's permit application. Resp. Br. at 14-17. The permit conditions imposed by the City mitigate these effects directly and permit the City access to address other, more systemic impacts at its own cost.[9] The City's anticipation of and advance planning for development impacts more than adequately protect Dolan's individual property interests.

Dolan, on the other hand, presents nothing in opposition to the City's showing other than a generic objection to the permit conditions. She did not include her own projections of drainage or traffic impact in her permit application, as she was required to do. Resp. Br. at 4-6. She did not include any evidence of unreasonable burden in her application for a variance or at any point during the litigation in the Oregon state courts. Resp. Br. at 4-6, 18-19. Indeed, Dolan ignores the extensive study and documentation underlying the plans and offers nothing undermining the correctness of their conclusions. She argues only that the City's failure to make individual findings of impact documenting the exact relationship between impact and condition necessarily invalidates the permit conditions. For this reason alone, Dolan has wholly failed to carry her burden of proof and cannot establish a violation of the Takings Clause.

2. *Under This Court's Multi-Factor Test, The City Did Not Take Dolan's Property*

Even apart from Dolan's failure to come forward with evidence supporting her takings claim, application of this

[9] For example, the City plans to undertake flood control improvements along Fanno Creek at its own expense. The greenway dedication ensures that the City will have access to the Creek in order to implement these improvements. Resp. Br. at 10.

Court's "multi-factor" test to the facts of this case makes plain that the City did not take her property. First, the "character of the governmental action" does not support the conclusion that a taking has occurred because, as discussed in part I.A., *supra*, the conditions are rationally related to the burdens of the proposed development. *Penn Central*, 438 U.S. at 124.

Second, the conditions do not impose a severe economic impact on Dolan. *See id.* at 124. Neither the greenway nor the pedestrian-bicycle path dedication interferes with her plans to build on her property or to operate her business. Notwithstanding her inability to use the dedicated portions of her land for commercial purposes, Dolan would derive the same economic benefits—based on the success of her plumbing and electrical store—from her property with or without these conditions. *See id.* at 136 (historic preservation ordinance allowed property owner "not only to profit . . . but also to obtain a 'reasonable return' on its investment"). This stands in stark contrast to the wide variety of land-use regulations that this Court and others have upheld despite considerable restriction of the owner's ability to derive desired economic benefits.[10]

Finally, the conditions do not interfere with Dolan's reasonable investment-backed expectations. *See id.* at 124. Dolan should have expected, based upon the City's plans and the experience of other downtown and Fanno Creek property owners, that her development would require measures to mitigate its drainage and traffic impact. The Master Drainage Plan requires the entire Fanno Creek stream channel to be available for the City's flood control improvements. *See* City of Tigard

[10] *See Goldblatt*, 369 U.S. at 592-93 (ordinance preventing owner of sand and gravel pit from using land for that purpose altogether); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (ordinance ordering total destruction of ornamental cedar trees to protect neighboring apple trees from disease); *Hadacheck v. Sebastian*, 239 U.S. 394, 413-14 (1915) (ordinance preventing owner of brickyard from using land for that purpose altogether).

Resolution 91-66, *reprinted in* Pet. App. at G-38–G-40. Similarly, the pathway system along Fanno Creek near the subject site is already partly constructed in both directions. *Id.* at G-25. Compliance with the City's conditions here falls squarely within any reasonable set of investment-backed expectations that Dolan could have held.[11]

Properly viewing Dolan's property interest as a whole,[12] the advantages she derives from the ability to develop her property manifestly offset the impact of the mitigation measures required by the City. The Court's analogy in *Keystone*, 480 U.S. at 498, between coal pillars and building setback requirements holds true for the greenway and pedestrian-bicycle path dedication requirements in this

[11] *See, e.g., Concrete Pipe*, 113 S. Ct. at 2291-92 (employer "could have had no reasonable expectation that it would not be faced with liability for promised benefits"); *Lucas*, 112 S. Ct. at 2894 n.7; *cf. id.* at 2903 (Kennedy, J., concurring) (referring to "owner's reasonable, investment-backed expectations" as point of reference for the value inquiry); *United States v. Locke*, 471 U.S. 84, 107 (1985) ("Regulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006-07 (1984) ("[Monsanto] can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission"); *PruneYard Shopping Center v. Robins*, 447 U.S. at 84 (shopping center owner failed to demonstrate that regulation preventing center from excluding certain people defeated reasonable investment-backed expectations).

[12] This Court consistently has held that Takings Clause analysis properly focuses on whether the property owner's interest as a whole has been unfairly infringed, not on whether government has "taken" one stick from the overall bundle of rights making up that property interest. *See Keystone*, 480 U.S. at 497; *Andrus*, 444 U.S. at 65-66; *Penn Central*, 438 U.S. at 130; *Pennsylvania Coal*, 260 U.S. at 419 (Brandeis, J., dissenting). *See also* Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. Colo. L. Rev. 599, 611-15 (1991).

case: The fact that the permit conditions require Dolan to dedicate, and thus not to develop, certain portions of her property does not distinguish those segments for Takings Clause purposes. The portions of her property to which the conditions apply, which were never part of Dolan's development plan, are only one element of her property interest, the diminution of which does not by itself constitute a taking. *See Keystone*, 480 U.S. at 498 (citing *Andrus*, 444 U.S. at 65-66). Where, as here, the conditions create a clear benefit to the public—as well as to Dolan herself—while imposing a comparatively slight harm on the developer, the City does not run afoul of the Takings Clause. *Texaco, Inc. v. Short*, 454 U.S. 516, 529-30 (1982); *see also Miller v. Schoene*, 276 U.S. at 279-80. To the contrary, the requirement that Dolan dedicate a portion of her land as part of a development permit is, like other reasonable land-use regulations, "a burden borne to secure 'the advantage of living and doing business in a civilized community.'" *Andrus*, 444 U.S. at 67 (quoting *Pennsylvania Coal*, 260 U.S. at 422 (Brandeis, J., dissenting)).

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

BRIEF FOR AMICI CURIAE 1000 FRIENDS OF OREGON, OREGON CHAPTER OF AMERICAN PLANNING ASSOCIATION, AMERICAN PLANNING ASSOCIATION, AND NATIONAL TRUST FOR HISTORIC PRESERVATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici 1000 Friends of Oregon, Oregon Chapter of the American Planning Association, American Planning Association, and National Trust for Historic Preservation file this brief pursuant to Supreme Court Rule 37. Counsel for the parties have consented to the filing of this brief and copies of their letters have been filed with the Clerk of the Court.

1000 Friends of Oregon (1000 Friends) is a nonprofit membership organization founded in 1975 by departing Governor Thomas McCall in order to oversee implementation of Oregon's reformed land-use planning and regulatory program. 1000 Friends is committed to a balanced approach to land-use issues and its Advisory Board includes development and business interests as well as conservation and environmental advocates. In order to advance the goals of Oregon's land-use system, 1000 Friends has long been active in appealing local decisions for administrative and judicial review, testifying before the state legislature, and preparing studies and background papers on technical issues related to land-use planning. 1000 Friends has a well-defined and widely-recognized interest in the correct interpretation, implementation, and enforcement of Oregon's land-use program.

Oregon Chapter of American Planning Association (Oregon Chapter), a State Chapter of Amicus American Planning Association, is a broad-based professional organization of approximately 500 members including urban and rural, professional and citizen planners. The primary aims of the Oregon Chapter include promoting sound planning and educating decision-makers and the general public about development policy and legislation. The Oregon Chapter recently received a National Planning Award for its innovative work on decreasing reliance on

the single-occupant vehicle. The Oregon Chapter continues to work actively to promote citizen participation in planning and the legislative process.

American Planning Association (APA) is a non-profit association of 28,000 members who are employed in or otherwise involved with land-use planning and related disciplines. APA members serve the land-use field on behalf of both governmental bodies exercising regulatory authority over real property and property holders subject to land-use regulation. Consequently, APA does not seek either to increase the constitutionally permissible scope of governmental regulation or to promote the interests, constitutional or otherwise, of individual property holders. Rather, APA is fundamentally and vitally interested in promoting rational, predictable, effective and beneficial land use consistent with the needs of individuals having recognized interests in real property and of the public at large. APA members are the professionals, elected and appointed officials, and citizens who engage in land-use planning to accomplish that fundamental goal.

National Trust for Historic Preservation in the United States (National Trust) is a private charitable and educational organization chartered by Congress in 1949 to further the historic preservation policy of the United States and to "facilitiate public participation in the preservation of sites, buildings, and objects of national significance or interest." 16 U.S.C. §§ 461, 468. Congress intended that the National Trust "will mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources." S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), reprinted in 1949 U.S.C.C.A.N. 2285, 2288. The National Trust has more than 250,000 individual, and 6,600 organizational, members nationwide. Through its Legal Defense

Fund, the National Trust advocates to secure judicial decisions that uphold the continued validity and effectiveness of regulatory protections for historic properties and land-use regulation in general. The National Trust has participated in nearly 80 federal and state court cases for nearly a quarter century, including eight regulatory takings cases heard in this Court.

STATEMENT OF THE CASE

Amici curiae 1000 Friends of Oregon, Oregon Chapter of American Planning Association, American Planning Association, and National Trust for Historic Preservation adopt Respondent City of Tigard's statement of the case.

ARGUMENT

Tigard's permit conditions are an integral part of Oregon's land-use regulatory process that tailors local comprehensive plans to address and mitigate the impacts of specific development proposals. Consequently, they satisfy this Court's traditional rationality review which gives due deference to the judgments of legislatures and administrators. This deferential approach remains appropriate, notwithstanding dicta appearing in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Petitioner's efforts to invoke these dicta from *Nollan* should be rejected, since she never properly challenged the application of Tigard's exactions to her development and since those dicta run contrary to the whole of this Court's jurisprudence and precedents. Amici respectfully request that this Court affirm the decision of the Oregon Supreme Court.

I. TIGARD'S PERMIT CONDITIONS ARE NOT BASED ON AD HOC DECISIONS, BUT RATHER ARISE FROM OREGON'S WELL-CONSIDERED LAND-USE PLANNING SYSTEM; PETITIONER'S CLAIM FAILS TO ADDRESS THE FACTUAL AND LEGAL BASIS FOR TIGARD'S CONDITIONS.

Notwithstanding Petitioner's contrary assertions, this case arises in the context of Oregon's land-use planning program, well established by statutes, administrative rules, case law, and practice. Given this background, Tigard's permit conditions are simply not ad hoc, nor are they founded merely on ipse dixit, as Petitioner suggests. Rather, Tigard's permit conditions facilitate local assessment of infrastructure needs based on a permit process that focuses on expected impacts of proposed development.

A. Tigard's Permit Conditions Arise from Oregon's Planning System Which Is Founded on Carefully Considered Legislative Judgments.

Tigard's exactions, like all of its land-use regulation, are founded in comprehensive planning. For nearly three quarters of this century, most states have authorized local governments to plan and regulate land use.[1] When properly implemented, planning tailors land-use regulation so

[1] The two model enabling acts created by the Harding and Coolidge administration that began land-use regulatory history failed to clarify the relationship between plans and regulations and defining this relationship was traditionally problematic for the courts, particularly where the plan was neither required nor binding. Sullivan and Kressel, *Twenty Years After: Renewed Significance of the Comprehensive Plan Requirement*, 9 Urb. L. Ann. 33 (1975).

that it both protects private property interests and provides a comprehensive and balanced approach to servicing public needs. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986); *Metromedia v. San Diego*, 453 U.S. 490, 531-33 (1981) (Brennan, J., concurring in judgment); *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 132 (1978). The planning process begins by gathering data on economic, demographic, cultural, physical, financial, and legal factors that shape land-use patterns. Planning builds on this empirical foundation to consider a diverse array of regulatory mechanisms, and to focus on the circumstances where they should be applied. It tailors public decision-making to address present conditions, while anticipating future needs. 1 Williams, *American Land Planning Law* § 1.11 (2d ed. 1988).

Administrative standards founded in planning constrain municipal discretion, permit land owners and developers to plan their own investment decisions based on predictable guidelines, and provide reviewing courts with "a measuring rod to gauge the validity of" a challenged exaction. *Longridge Builders, Inc. v. Planning Board of Princeton*, 245 A. 2d 336, 338 (N.J. 1968). By developing and implementing comprehensive planning programs, municipalities serve all of these interests. In sum, planning affords a basis for land-use regulation that is the antithesis of the type of singling out forbidden by the takings clause. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Recognizing these benefits from planning, many states – acting in their familiar role as policy makers – revamped their land-use systems during the last twenty-five years. Oregon remains a leader in this movement. Starting in 1969, the state legislature required (rather than merely authorized) local governments to plan and zone lands within their boundaries. 1969 Or. Laws 324. In 1973,

the Oregon legislature enacted Senate Bill 100 to further enhance the role of planning in land-use regulation. 1973 Or. Laws 80.

Most importantly, Senate Bill 100 required all local governments to adopt comprehensive plans, Or. Rev. Stat. §§ 197.010, 197.015(5) & 197.175(2)(a), and to implement those plans through zoning, subdivision, and other land-use regulations. *Id.*, §§ 197.175(2)(b) & 197.015(11). The legislation also authorized a new state agency, the Land Conservation and Development Commission (LCDC), to adopt and amend mandatory planning goals, *id.*, § 197.040(2)(a), and administrative rules, *id.*, § 197.040(1)(c), after an elaborate state-wide public hearing process. *Id.*, §§ 197.225-247. Oregon's system provides a high degree of predictability and fairness in land-use regulation by specifying minimum local procedures and requiring that land-use decisions be based upon plans.[2]

Cities and counties retain primary authority for planning and regulating land use consistent with the requirements of the state-wide goals. *Id.*, § 197.005(3). When holding hearings on permit applications, local government must follow detailed and specific procedural requirements. *Id.*, § 197.763. LCDC reviews local land-use plans and regulations for compliance with the goals through a formal process of "acknowledgment." *Id.*,

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[2] "The application shall not be approved unless the proposed development of land would be in compliance with the comprehensive plan for the city and other applicable land use regulation or ordinance provisions. The approval may include such conditions as are authorized by ORS 227.215 or any city legislation." Or. Rev. Stat. § 227.175(4).

§§ 197.251 & 197.015(1).[3] When the legislature adjusts the statutory framework of the land-use system,[4] local plans and regulations must be reviewed and in some cases revised to reflect the changed understanding of proper land-use policy.

In 1979, the legislature fashioned a new approach to reviewing challenges to land-use decisions made by local governments and state agencies. It gave a new entity, the Land Use Board of Appeals (LUBA), exclusive jurisdiction (subject to judicial review) over land-use appeals. *Id.*, §§ 197.805-855 & 197.015(10). Among other grounds, the alleged unconstitutionality of a permit decision can be the focus of a LUBA hearing. *Id.*, § 197.835(7)(a).

LUBA is required to decide cases quickly and efficiently.[5] *Id.*, § 197.805. To facilitate this speed and efficiency, parties must raise issues at the local government level in order to be heard by LUBA and the appellate

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[3] LCDC also has enforcement authority over local governments to ensure that planning and land-use actions are consistent with the goals. Or. Rev. Stat. §§ 197.319-335.

[4] For example, the legislature has required local governments to provide sufficient land zoned for all kinds of residential uses (Or. Rev. Stat. §§ 197.295-315), required manufactured housing to be a major factor in local plans (*Id.*, §§ 197.475-490), required housing for the disabled or those with special needs to be provided in local plans (*Id.*, §§ 197.660-670), required seasonal farm worker housing to be provided where needed (*Id.*, §§ 197.675-685), and has limited the power of state agencies, special districts or cities and counties to enact moratoria (*Id.*, §§ 197.505-540).

[5] The various time frames for land-use decision making and appeal, and LUBA and Court of Appeals consideration, mean that it is possible to have a matter before the state supreme court within a year of filing a permit application. Or. Rev. Stat. §§ 197.830(8), (19), 197.850(5), (7), 197.855(1).

courts. *Id.*, §§ 197.763(1), 197.830(10) & 197.835(2).[6] The regulations challenged by Petitioner arise out of this planning background.

B. The Challenged Regulatory Conditions Were Properly Tailored to the Likely Impacts of Petitioner's Proposed Development.

Tigard's plans are an integral part of its land-use regulatory program. These plans provide reasonably foreseeable requirements for proposed development. Significantly, the City's plans not only justify permit conditions, but could also justify outright denial of Petitioner's application.

Tigard has an "acknowedged" comprehensive plan and land-use regulations. This means, among other things, that its plans and regulations were adopted after full citizen participation (Goal 1), are internally consistent and coordinated with plans and programs of other governmental agencies (Goal 2), guard against pollution of stormwater (Goal 6), allow only appropriate land uses in areas prone to natural disasters and hazards (Goal 7), encourage economic development (Goal 9), accommodate public services and facilities (Goal 11), and provide for an effective and coordinated transportation system (Goal 12). For developers, having land-use regulations in accordance with a comprehensive plan means that implementation of the policies is predictable and that an opportunity to weigh exactions is available at the time a permit is requested.

As Respondent's brief makes clear, Tigard developed detailed transportation and storm drainage plans only

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[6] LUBA "shall be bound by any finding of fact of the local government, special district or state agency for which there is substantial evidence in the whole record." Or. Rev. Stat. 197.830(13)(b).

after thorough empirical studies. It has also enacted the regulatory means to implement these plans when a property owner requests development permission. The conclusions embodied in Tigard's plans are applied to an individual development proposal according to the expected impacts that arise with each permit application. Tigard's Master Drainage Plan is based on an extensive study by the City's engineering consultants. Its Transportation Plan addresses the existing conditions and anticipated needs for both conventional and alternative transportation modes. Those plans calculate the city's infrastructure needs at full development in accordance with the land-use designations on the plan map.

When individual development permission is requested, as in this case, Tigard reviews the impacts specifically expected from the proposed development and imposes conditions in response to those impacts. In the "Action Area" overlay district, where Petitioner proposes her development, Tigard may require reasonably related exactions only from "major modifications" in use "where such conditions are necessary to:

> a. Carry out applicable provisions of the Tigard comprehensive plan;
> b. Carry out the applicable implementing ordinances; *and*
> c. Ensure that adequate public services are provided to the development or to ensure that other required improvements are made."

Tigard Community Development Code (CDC) §§ 18.120.070(B), 18.32.250(F)(1) (emphasis added). If a developer objects, its contentions of an insufficient relationship must be raised before Tigard's permitting agencies. Or. Rev. Stat. § 197.763(1). This procedural rule places little burden on the developer, since it merely builds upon independent application requirements to set

forth the traffic and drainage impacts of a proposed development. CDC §§ 18.164.030 & 18.164.100 & 18.84.000 *et seq.* Petitioner failed to fulfill even this standard request; moreover, she never disputed Tigard's attribution of impacts in its planning staff report and development approvals. Nor did Petitioner challenge the findings supporting Tigard's decision at LUBA or in the courts. Now, however, Petitioner asks this Court to do something that it has traditionally avoided – she asks that it second-guess a municipal regulatory decision – notwithstanding those uncontested findings.

If Petitioner had applied for a permit to construct a storage shed, no exactions would have been required, since the expected impacts would have been minimal. If she had sought to build a mini-market instead of an expanded plumbing store, Tigard's conditions may well have been different than those imposed here, since its specific impacts might have had a different relationship to the needs identified in its plans. Based on formulas set forth in its plans, Tigard calculated the increased run-off from proposed additional impermeable surfaces from the larger building and more paved parking. Tigard calculated the increased vehicular traffic attributable to the changed use based on similar data. Its findings detailed how these calculations applied to Petitioner's proposed expansion. Thus, Tigard addresses its infrastructure needs at the front end of the process (i.e., in the development of its facilities plans), and applies those plans at the permit stage (i.e., when a major change in use is requested). Safeguards exist for the property owner in the form of opportunities to challenge a condition during the permit adjudication based on the findings and evidentiary support underlying the condition.

In the absence of a well-considered planning process such as Tigard's, a city might "underzone" an area (i.e.,

by restricting the intensity of development below a level that sound planning might deem appropriate) and then negotiate exactions on an ad hoc basis whenever a rezoning is requested. Alternatively, a city might project into the future its suspicions about the most intense land use possible for a site and, when a first permit is sought, impose a "one size fits all" exaction as a condition of approval. Tigard has rejected both alternatives.

Instead, Tigard has elected to consider and regulate the impacts of development by mitigating specific impacts when they occur. A central purpose of planning is to address water, sewer, transportation, drainage and other infrastructure needs as nearly concurrently as possible with actual development. By adopting and implementing its transportation and drainage plans, Tigard has done precisely that.

Tigard's approach tailors conditions to meet identified impacts. If Petitioner believes the conditions lack a nexus to the impacts, the simple method of testing that premise is to challenge the adequacy of, and evidentiary support for, the City's findings. *See Cummins v. Washington County*, 22 Or. LUBA 129 (1991), *aff'd*, 823 P.2d 438 (Or. App. 1992) (citing *Norvell v. Portland Area LGBC*, 604 P.2d 896 (Or. App. 1979)). Petitioner did not follow this procedure by presenting her own calculations, or other evidence, for the City, LUBA, and the courts to consider, or by challenging Tigard's methodology. Rather, she seeks to invoke abstract questions inviting judges to use their own decisional predilections. This case should be resolved by focusing on its facts, i.e., by discussing the actual relationship between her impacts and Tigard's conditions.

The citizenry's needs, and Tigard's efforts to address these needs as they are implicated by individual development applications, are reflected through the City's

comprehensive and public facilities plans, not the ipse dixit Petitioner perceives. Petitioner could have challenged the basis for Tigard's exactions, their proportionality as a cost of development, or the sufficiency of evidence underlying Tigard's order, but she did not do so.

C. Petitioner Failed to Challenge the Findings Supporting Tigard's Conditions on Her Development.

Tigard imposed several conditions when approving Petitioner's permit request, based on carefully drawn and unchallenged findings regarding the impacts of her proposed development. Petitioner's challenge lacks references to the facts of the case, or the plans, policies and regulations which provide its context. Instead, it makes a broad, abstract attack on local authority to impose conditions of approval on permits.

In fact, Petitioner conceded both the sufficiency of a public purpose and the presence of a nexus between that purpose and the imposed exaction in her arguments before LUBA:

> Petitioners do not contend that establishing a greenway in the floodplain of Fanno Creek for storm water management purposes, and providing a pedestrian/bicycle pathway system as an alternative means of transportation, are not legitimate public purposes. Further, petitioners do not challenge the sufficiency of the 'nexus' between these *legitimate public purposes* and the *condition* imposed requiring dedication of portions of petitioners' property for the greenway and pedestrian/bicycle pathway. Rather, petitioners' contention is that under both the federal and Oregon Constitutions, the relationships between the *impacts* of the proposed development and the *exactions* imposed are insufficient to justify requiring dedication of petitioners' property without compensation.

Dolan v. Tigard, 22 Or. LUBA 617, 621 (1992) (emphasis supplied). Thus, Petitioner's arguments before LUBA conceded that this case was unlike the situation in *Nollan* where no nexus existed. Petitioner's current claims of an insufficient relationship fail to challenge either the adequacy of the findings or the sufficiency of the evidence underlying Tigard's order.

Finally, Petitioner has not argued that, if the reasonable relationship test were applied, then the City's decision would not pass muster. Rather, she argued that a "substantial advancing" test must be met. This Court should confirm that the "reasonable relationship" test is the proper analysis, and that Tigard's exactions pass that test.

II. RATIONALITY REVIEW IS PROPERLY A DUE PROCESS ANALYSIS; EVEN IF INCORPORATED INTO THE TAKINGS INQUIRY, IT SHOULD ADHERE TO THE REASONABLENESS STANDARD BY WHICH COURTS EXPRESS THE TRADITIONAL RESPECT EXISTING BETWEEN BRANCHES OF GOVERNMENT.

Petitioner's claim presents an inappropriate approach to takings analysis in several respects. First, this Court's traditional takings analysis has not encompassed rationality review at all; instead, the due process clause has long been looked to as the proper source for such analysis. Second, regardless of its constitutional foundation, judicial review of the rationality of economic regulation, including land-use regulation, has long given due deference to the judgment of other governmental bodies.

This Court should reject the Lochnerian approach suggested by the *Nollan* dicta by reaffirming its long pattern of decisions in land-use and other economic regulation cases.

A. Judicial Measurements of the Rationality of Legislative Action Arise from the Due Process Clause; They Are Not Proper Subjects for Takings Analysis.

It has long been clear that a challenge to the rationality of legislative and administrative action comes under the due process clause. *Lawton v. Steele*, 152 U.S. 133 (1894). This Court has historically heard land-use cases, for example, as substantive due process claims. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926); *Nectow v. Cambridge*, 277 U.S. 183, 185 (1928); *Gorieb v. Fox*, 274 U.S. 603, 605 (1927); *Zahn v. Board of Public Works*, 274 U.S. 325, 327 (1927).

The takings clause undertakes a similar inquiry only by borrowing from the substantive due process analysis. *Moore v. East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in judgment) (suggesting that *Euclid* "fused" the two inquiries). When proffering the "substantially advanc[ing]" test of rationality, *Nollan* cites *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), briefly summarizing two lines of land-use precedent. *Nollan*, 483 U.S. at 834 n.3. *Agins* in turn directly references *Nectow*, 277 U.S. at 188, a substantive due process case. *Agins*, 447 U.S. at 260. And *Nectow* relies upon *Euclid*, 272 U.S. at 395, yet another

substantive due process case. *Nectow*, 277 U.S. at 188. Thus, the very citation from *Nollan* suggesting a distinct takings inquiry reveals that the takings clause does not offer an independent source of authority for such an analysis.[7]

The purposes of the due process and takings clauses reinforce this conclusion. As a threshold inquiry, substantive due process analysis establishes the outer "limits beyond which the legislature cannot rightfully go." *Mugler v. Kansas*, 123 U.S. 623, 661 (1887). To determine if governmental action extends beyond constitutionally permissible boundaries, this analysis typically balances public and private interests. *See, e.g., Euclid*, 272 U.S. at 386-87. In this context, if the validity of land-use regulation "be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388. This "original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies" has endured for the better part of this century. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).[8]

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[7] The different remedies afforded to due process and takings violations reinforce the importance of properly separating the two inquiries. While due process violations – improper exercises of the police power – are invalidated, unconstitutional takings are remedied by payment of "just compensation." *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). Given the separate purposes of the two clauses, as outlined below, the remedy for one may not address the needs of the other. *Nollan*, 483 U.S. at 866 (Stevens, J., dissenting).

[8] This Court has "ma[d]e it plain that [it] does not sit as a super-legislature to weight the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). *See Heller v. Doe*, 113 S.Ct. 2637, 2642-73 (1993); *F.C.C. v. Beach Communications, Inc.*, 113 S.Ct. 2096, 2101-03 (1993); *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981).

The takings clause serves a narrower, more specific purpose in protecting private property. It "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of *otherwise proper* interference amounting to a taking." *First English*, 482 U.S. at 315 (emphasis added). In contrast to the due process balancing of public and private interests, takings analysis measures a regulation's impact upon private property against the pre-existing private interest. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This Court has recognized two primary circumstances in which a regulatory taking may be found. Both "a permanent physical occupation authorized by government" and a "regulation that deprives land of all economically beneficial use" have the practical effect of destroying any interest that a property held, analogous to the forced conversion exercised by power of eminent domain. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992).

The *Nollan* opinion acknowledged that rationality review implicates no traditional takings clause concerns. *Nollan*, 483 U.S. at 835 n.4. Indeed, by suggesting that failure to substantially advance a legitimate purpose could singlehandedly result in a taking, *Nollan* deviates sharply from this Court's takings decisions under which the governmental interest is one of many factors in an ad hoc balancing process. *Penn Central*, 438 U.S. 104; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1986); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Despite the absence of jurisprudential or precedential support, *Nollan* suggested that the rationality test

could determine a taking. *Nollan*, 483 U.S. at 842.[9] This Court should make it clear that takings claims such as Petitioner's do not encompass rationality review.

B. Both Due Process and Takings Cases, Including *Nollan's* Holding, Demonstrate this Court's Respect for Legislative Judgments.

None of this Court's land-use decisions before *Nollan* suggested that the "substantially advancing" language should validate a heightened standard of review. Even *Nollan* itself actually applied the "reasonable relationship" standard, and not a stronger test. *Nollan*, 483 U.S. at 838. Notwithstanding some dicta buried in *Nollan's* footnote three, this Court's land-use decisions make clear that a properly circumscribed judicial role dictates the well-established "fairly debatable" approach to legislative judgments. *Euclid*, 272 U.S. at 388. For example, the Court upheld an ordinance creating an exclusive residential zone in a rapidly urbanizing area, refusing to "substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." *Zahn*, 274 U.S. at 328. The Court upheld building setback requirements shortly thereafter, noting that increasing urban population density had provoked new regulatory responses:

> State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation

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[9] Regulations intruding upon the right to exclusive occupation do not always constitute takings, as where the owner's use of its property regularly invites public use. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-84 (1980).

> which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

Gorieb, 274 U.S. at 608. Taken together, these cases reveal that the "substantially advancing" standard has been applied with due deference to the judgments of land-use regulators.[10] It has not been used to intensify judicial scrutiny of land-use regulations.

More recently, this Court has invoked the "reasonable relationship" standard to emphasize its respect for legislative judgments regarding land use. For example, the "familiar standard of 'reasonableness' " was the centerpiece of *Goldblatt's* holding. *Goldblatt*, 369 U.S. at 594-95. In *Penn Central*, this Court's ad hoc balancing of interests was consistent with a deferential threshold inquiry of reasonableness, not with a substantial advancement requirement. *Penn Central*, 438 U.S. at 123. Justice Stevens' swing vote in *Moore* focused on "the limited standard of review of zoning decisions which this Court preserved in *Euclid* and *Nectow*." *Moore v. East Cleveland*, 431 U.S. 494, 520 (1977) (Stevens, J., concurring in judgment). Finally, in *Schad* and *Arlington Heights*, this Court held up the reasonable relationship standard to highlight the extraordinary circumstances of those cases where a more demanding standard became necessary when fundamental free speech rights were implicated or a suspect racial classification was employed. *Schad v. Borough of Ephraim*, 452 U.S. 61, 68 (1981); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263 (1977). Moreover, on the occasions when this Court has

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[10] Of course, if the record created below expressly found that a zone classification failed to serve any police power goals, it might be invalidated, at least when it also precluded any "practical use" of the land. *Nectow*, 277 U.S. at 187-88.

invoked the "substantially advancing" language, it has also made clear the continued importance of the presumption of validity and accompanying judicial deference. See, e.g., *Keystone*, 480 U.S. at 493.

Consistent with this court's earlier holdings, the *Nollan* decision ultimately rested upon the familiar reasonable relationship standard, thus rejecting the dicta in its own footnote three and in a handful of recent cases. Thus, its holding is consistent with this Court's long-standing respect for other branches of government and with state courts' approaches to reviewing exactions. The Court concluded that the lateral beach access exacted by the California Coastal Commission did "not meet even the most untailored standards" of judicial review. *Nollan*, 483 U.S. at 838. It did so after "accept[ing], for purposes of discussion," and applying the reasonable relationship standard and justifying its approach as consistent with that of all state courts, save California. *Id.*

The Court's analysis began by noting that "a broad range of governmental purposes," including scenic zoning, landmark preservation and residential zoning, constitute legitimate state interests. *Id.* at 834-35 (citing *Agins*, 447 U.S. 255; *Penn Central*, 438 U.S. 104; *Euclid*, 272 U.S. 365). The Court then "assume[d], without deciding" that the three purposes asserted by the Coastal Commission also satisfied this test. As described by the Court, "among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches." *Id.* at 835.

The Court then turned to the second portion of the inquiry; "how close a 'fit' between the condition and the burden is required." *Id.* at 838. The Court concluded that it was "quite impossible to understand" how the means

used by the Commission served the ends asserted in any way at all. *Id.* at 838. In so doing, the Court followed and applied the reasonable relationship test. *See, also, Concrete Pipe Products of California v. Construction Laborers Pension Tr.*, 113 S.Ct. 2264, 2289 (1990).

Nollan also identified a large number of state and lower federal court decisions that were "consistent with [its] approach." *Id.* at 839. Significantly, the vast majority of these decisions are reasonable relationship cases. *See, Parks v. Watson*, 716 F.2d 646, 652 (9th Cir. 1983); *Bethlehem Evangelical Lutheran Church v. Lakewood*, 626 P.2d 668, 673-74 (Colo. 1981); *MacKall v. White*, 445 N.Y.S.2d 486, 487 (App. Div. 1981); *Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980); *Briar West, Inc. v. Lincoln*, 291 N.W.2d 730 (Neb. 1980); *Call v. West Jordan*, 614 P.2d 1257, 1258 (Utah 1980); *Collis v. Bloomington*, 246 N.W.2d 19, 23 (Minn. 1976); *State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363, 367 (Mo. 1972); *Schwing v. Baton Rouge*, 249 So.2d 304, 308 (La. App.), application denied, 252 So.2d 667 (La. 1971); *Longridge Builders*, 245 A.2d at 337; *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673, 676 (N.Y. 1966); *Jordan v. Menomonee Falls*, 137 N.W.2d 442, 447 (Wis. 1965); *Billings Properties, Inc. v. Yellowstone County*, 394 P.2d 182, 186 (Mont. 1964).[11]

The *Nollan* opinion juxtaposed these reasonable relationship cases against California's doctrine, which had "firmly established that the justification for required dedication is not limited to the needs of or burdens created by the project." *Remmenga v. California Coastal Commission*, 209 Cal. Rptr. 628, 631 (1985) (cited in *Nollan*, 223

[11] An alternative analysis strenuously criticizes *Nollan*'s string citation as failing to understand the various state tests. 1 Williams, *American Land Planning Law*, § 5A.20 n.81 (2d ed. 1988). The Illinois standard, in particular, contrasts sharply with that found in virtually every other state. *Id.* § 6.16.

Cal.Rptr. 28, 30 (Cal. Ct. App. 1986), *rev'd*, 483 U.S. 825)). By contrasting these two lines of precedent (mainstream reasonable relationship doctrine, and California's aberrational approach), *Nollan* underscored the Court's explicit acceptance and application of the widespread reasonable relationship standard. *Id.*

Framed in broader terms, these cases illustrate that the normal presumption of validity and accompanying deferential respect for decisions made by the legislature have long been recognized as central features in American law derived from the characteristics of the various branches of government. The Court has emphasized this point repeatedly: "[a]s underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." *O'Gorman & Young v. Hartford Fire Insurance Co.*, 282 U.S. 251, 258 (1931); *Carolene Products Co.*, 304 U.S. at 783, *Keystone*, 480 U.S. at 493.[12]

Appellate courts have acknowledged time and again that it is not their function to try cases anew, or debate the wisdom of legislative action. The virtues of this approach are heavily reinforced by the importance of protecting judicial dockets from being overwhelmed with cases where resourceful parties routinely challenge well-considered and necessary governmental regulation. The courts have consequently limited their role to assessing the reasonableness of governmental action, when questions about such reasonableness have been properly raised and preserved for review. This Court has rejected

[12] This Court should resist requests to gut the police power by resurrecting antiquated doctrines as a "second best" alternative to direct assault. Epstein, *The Supreme Court, 1987 Term – Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 5, 28 (1988).

efforts to "federalize" zoning disputes and other property claims. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Parratt v. Taylor*, 451 U.S. 527 (1981). Similarly, it should reject Petitioner's efforts to turn this and other federal courts into super-planning commissions, where developers might consistently seek a "better deal" than that which they received from the governmental bodies properly charged with the duty of administering land-use regulation.

Thus, in this case, Tigard's decision to use exactions based on carefully formulated plans should be respected by courts reviewing its land-use regulatory system. Particularly since those plans and regulations grew out of a system enacted by the Oregon legislature after careful consideration, this Court should give deference to the legislature's determination that these are the appropriate means for addressing a series of legitimate governmental concerns.

III. LOCAL GOVERNMENTS EMPLOY REGULATORY CONDITIONS AFTER ASSESSING A DEVELOPMENT'S LIKELY IMPACTS ON THE BASIS OF SOUND PLANNING PROJECTIONS; COURTS DEFER TO THESE ADMINISTRATIVE FINDINGS.

Local governments typically administer their exactions programs so that regulatory conditions are tailored to respond to actual development impacts. The findings that support such tailoring traditionally and appropriately form the basis for judicial review of specific exactions. These regulatory programs are common; indeed, during this Court's long absence from the land-use field, the state courts fashioned standards for determining the constitutionality of local government ordinances authorizing a wide variety of development

exactions.[13] Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: a Brief History of Land Development Exactions*, 50 L. & Contemp. Probs. 5, 6, 11-14 (1987). Contemporary exactions practice routinely relies on reasonable planning projections to assess the expected development impact upon which it will be based. Careful analysis of state court exactions cases demonstrates that these courts, in line with this Court's deferential approach to local administrative action, have traditionally respected administrative findings of expected impact.

A. Contemporary Exactions Programs Rely Upon Planning Projections to Anticipate a Development's Likely Impacts and Determine the Proper Regulatory Response.

Municipalities across the country administer exactions programs of various types, including on-site dedications, off-site improvement requirements, and impact fees. Bauman & Ethier, *Development Exactions and impact Fees: A Survey of American Practices*, 50 L. & Contemp. Probs. 51, 56 (1987). These exactions are applied to all

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[13] Despite different labels, there is a consensus on the appropriate test, building on a leading Wisconsin case, *Jordan*, 137 N.W.2d at 448, which sticks closely to the reasonableness standard. *See, e.g., Parks*, 716 F.2d at 653; *Call*, 614 P.2d at 1258; *Collis*, 246 N.W.2d at 23; *Jenad*, 218 N.E.2d at 676 (all cited in *Nollan*).

Two aberrational approaches also exist: Illinois' strict test, *Pioneer Trust & Savings Bank v. Mount Prospect*, 176 N.E.2d 799 (Ill. 1961) (need for exaction must be "specifically and uniquely attributable to" development's impact); and the lenient California doctrine rejected by *Nollan*. *Associated Home Builders v. Walnut Creek*, 484 P.2d 606 (Cal. 1971) (justifying exaction purely "on the basis of general public need," irrespective of development's impact).

manner of development activity, from residential subdivisions to commercial and industrial facilities. *Id.* The common element among exactions programs is that they are fashioned as part of a broader planning process, and applied with attention to the expected impacts of a particular development. Siemon, *Who Bears the Cost?*, 50 L. & Contemp. Probs. 115, 116-18 (1987).[14]

The Constitution has never required absolute precision from land-use planning and regulation. This Court's opinions "do not suggest that courts 'have a license to judge the effectiveness of legislation' . . . or that courts are to undertake 'least restrictive alternative' analysis. . . . That a land-use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for

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[14] The Oregon Supreme Court recently considered this issue in a different context. *Oregon Department of Transportation v. Lundberg*, 825 P.2d 641 (Or.), *cert. denied* 113 S.Ct. 467 (1992). Lundberg owned a vacant lot on a commercial highway, along which the City's plan required a specific right-of-way if commercial development was proposed prompting a need for the dedication. Before Lundberg's parcel was developed, however, the State condemned the right-of-way to construct highway improvements. The Oregon Supreme Court upheld a jury instruction that there were nominal damages in such situations, because a "reasonable relationship" existed between anticipated commercial development and the right-of-way. *Id.*, at 646-47. Where, as here, the anticipated commercial development has actually been proposed, not even nominal damages would be warranted.

There are good reasons for agreeing with *Lundberg's* proposition that a city's plan can establish the reasonable relationship. Cities do not fill every administrative record with the technical papers and research used in compiling a comprehensive plan. An applicant for local approval may challenge this data when seeking development permission, either by disputing the City's findings and conclusions or by critiquing their evidentiary support. In this case, Petitioner did neither.

rejecting it." *Keystone*, 480 U.S. at 487 n.16. In *Euclid*, for example, the Court recognized "that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished in terms of legislation." *Euclid*, 272 U.S. at 389. Requiring undue precision for every individual exaction would ignore the constitutional principle that a modicum of flexibility is "necessary to deal realistically with questions not susceptible of exact measurement." *Banberry Development Corp. v. South Jordan City* 631 P.2d 899, 904 (Utah 1981) (citation omitted); *see also Contractors & Builders Ass'n v. Dunedin*, 329 So. 2d 314, 320 n.10 (Fla. 1976) ("perfection is not the standard of municipal duty").[15]

Even if exact measurement were possible, holding the yardstick up to every impacted property interest would be a cumbersome, timely and costly process. *Jordan*, 137 N.W.2d at 447. If this Court demands a "property rights impact statement" for every individual exaction, it is property owners who would doubtless suffer through protracted administrative review seeking the perfect fit between exaction and objective.

Moreover, demanding undue certainty in land-use planning would stymie government's ability to regulate land use. This Court has recognized that "[g]overment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal*, 260 U.S. at 413. As one of the leading exactions cases pointed out:

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[15] Even the aberrationally strict Illinois standard allows "averages to predetermine" a development's expected impact. *Northern Illinois Home Builders Ass'n v. Du Page County*, 621 N.E.2d 1012, 1021 (Ill. App. Ct. 1993).

> In most instances it would be impossible . . . to prove that [a dedication requirement] was to meet a need solely attributable to the anticipated influx of people . . . [who will] occupy this particular subdivision. On the other hand, the municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications required of the subdividers be utilized for school, park and recreational purposes for the benefit of such influx. In the absence of contravening evidence this would establish a reasonable basis for finding that the need for the acquisition was occasioned by the activity of the subdivider.

Jordan, 137 N.W.2d at 447.

Finally, as is the case here, planning also provides "some demonstrable benefit" to the very property subject to an exaction. *Call*, 606 P.2d at 1259. Planning can create a regulatory framework benefiting property's ultimate users, as by guarding the "welfare of families" who will occupy a residential subdivision. *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863, 867 (Fla. Dist. Ct. App. 1976), *cert. denied*, 348 So. 2d 955 (Fla. 1977) At other times, the advantage flows directly to developers, as a necessary by-product of municipal planning. *See, e.g., Aunt Hack Ridge Estates, Inc. v. Danbury*, 273 A.2d 880, 885 (Conn. 1970) (park dedication increased market value for subdivision lots); *Ayres v. City Council*, 207 P.2d 1, ___ (Cal. 1949) (lot layout minimized land loss and decreased street improvement costs). Yet other times, as in this case, the developer and the ultimate user are the same entity. Here, the benefits include protection from increased flooding on Petitioner's property and facilitation of consumer access to her expanded business.

B. Administrative Findings on Expected Development Impact and the Proper Regulatory Conditions Receive Due Deference from Reviewing Courts.

If a developer believes that an exaction is unreasonable (under any of the different state standards), it bears the burden of proving that the data upon which the exaction is founded is unreasonable. *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989). This requirement is familiar throughout administrative law:

> Since the information that must be used to assure that [the exaction is] within the standard of reasonableness is most accessible to the municipality, that body should disclose the basis of its calculations to whoever challenges the reasonableness of its [exaction]. Once that is done, the burden of showing failure to comply with the constitutional standard of reasonableness in this matter is on the challengers.

Banberry, 631 P.2d at 904; *see also College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984) (" ' extraordinary burden' rests on one attacking") (cited in *Nollan*); *Home Builders Ass'n v. Kansas City*, 555 S.W.2d 832, 835 (Mo. 1977).

As *Nollan* made clear, a land-use agency that fails to meet its initial burden of coming forward with evidence will no longer enjoy the ordinarily favorable assumptions about the factual basis for its decision. *See, e.g., Metromedia*, 453 U.S. at 509 (plurality opinion); *Penn Central*, 438 U.S. at 132; *Railway Express Agency v. New York*, 336 U.S. 106, 109 (1949). Because the Coastal Commission's justifications were fashioned after the Nollans' initial judicial challenge, the Court apparently believed that these were "made-up purpose[s] of the regulation."

Nollan, 483 at 828, 839 n.6. This peculiar posture – administrative findings ascribed only after a judicial challenge – suggested that the Commission's "purpose [was] avoidance of the compensation requirement, rather than the stated police-power objective." *Id.* at 841.[16] This suspicion of administrative findings is appropriate only for post hoc rationalizations for a decision already made, as occurred in *Nollan*. When examining Petitioner's claims, which leave Tigard's conventional, pre-decisioned findings unchallenged, this Court should recognize that the distrust of the Coastal Commission in *Nollan* reflected that case's peculiar posture, and should not be ingrained into takings jurisprudence to create a standard of review that would damage the legal foundation of land-use planning and regulation nationwide.

CONCLUSION

Tigard's exactions arise out of a well-considered planning program and have been tailored to mitigate the specific impacts expected from Petitioner's development. Petitioner challenges none of that. Rather, she asks this Court to adopt a test that its cases have long rejected, simply so that she can have a second chance. Lest the courts of this country become embroiled in second-guessing the technical decisions of planning commissions,

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[16] *Nollan* also suggested a safe-harbor for governmental regulations - a per se non-taking. When a permit condition is justified by the same purpose that would have supported outright denial, then the regulation "should not be found to be a taking." *Nollan*, 483 U.S. at 836.

amici respectfully request that this Court affirm the judgment of the Oregon Supreme Court.

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Cases

Adolph v. Federal Emergency Management Agency, 854 F.2d 732 (5th Cir. 1988) 20

April v. City of Broken Arrow, 775 P.2d 1347 (Okl. 1989) 20

Commercial Builders v. Sacramento, 941 F.2d 872 (9th Cir. 1991) 21

Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 113 S. Ct. 2264, (1993) 20,23

Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964) 21

First English Evangelical, Lutheran Church of Glendale v. County of Los Angeles, 258 Cal. Rptr. 893 (Ct. App. 1989) 20

Foreman v. State Department of Natural Resources, 180 Ind. App. 94, 387 N.E.2d 455 (1979) 21

Gorieb v. Fox, 274 U.S. 603 (1927) 20

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 19

Krahl v. Nine Mile Creek Watershed District, 283 N.W.2d 538 (Minn. 1979) 21

Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419, 426, 102 S. Ct. 3164, 3171 (1982) 21

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) 19,20

Maple Leaf Investors, Inc. v. State Dept. of Ecology, 88 Wash. 2d 726, 565 P.2d 1162 (1977) 21

Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987) 22,passim

Nordlinger v. Hahn, 112 U.S. 2326 (1992) 28

Pennell v. City of San Jose, 485 U.S.1 (1988) 23

Pope v. City of Atlanta, 242 Ga. 331, 249 S.E.2d. 16 (1978), *cert. denied*, 440 U.S. 936 (1979) 21

Responsible Citizens v. City of Asheville, 308 N.C. 255, 302 S.E.2d 204 (1983) 20

Spiegle v. Beach Haven, 46 N.J. 479, 218 A.2d 129 (N.J. 1966) 21

Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025 (D.D.C. 1978), *aff'd mem.* 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979) 20

Town of Indialantic v. McNulty, 400 So.2d 1227

(Fla. App. 1981) 20

Turner v. County of Del Norte, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972) 22

Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973) 22

Usdin v. State Department of Environmental Protection, 173 N.J. Super. 311, 414 A.2d 280 (1980) 20

Yee v. City of Escondido, 112 S. Ct. 1522, 1528 (1992) 22,28

Statutes and Regulations

44 C.F.R. Parts 59-77 (1993) 14-17

Sec. 404 of the Clean Water Act, 33 U.S.C. §1344 (1992) 13

Coastal Zone Management Act, 16 U.S.C. §§1451-1464 (1992) 13

Food Security Act of 1985 ("Swampbuster"), 16 U.S.C. §§3821-3824 (1992) 13

Wild and Scenic Rivers Act, 16 U.S.C. §§1271-1287 (1992) 13

Pub. L. 90-448, Title XIII, 82 Stat. 572 (codified as amended at 42 U.S.C. Sec.

4001-4128 (1992) 11

Pub. L. 93-234, 87 Stat. 975 (1973) (codified as amended at 42 U.S.C. Sec. 4001-4128 (1992) 11,12

Emergency Supplemental Appropriations for Relief from the Major Widespread Flooding in the Midwest Act of 1993, P.L. 103-75, 107 Stat. 739 (1993) 3

Presidential Executive Order 11988 on Floodplain Management, 47 Fed. Reg. 26951 (May 24, 1977) . . . 12

Miscellaneous

Annual Report Fiscal Year 1992 of the Secretary of the Army on Civil Works Activities (1 October 1991 -- 30 September 1992, Vol. II) 4

Association of State Floodplain Managers, *Floodplain Management 1992: State and Local Programs (1992)* 16

Association of State Floodplain Managers, "Workshops # 3 Land Use Regulations; Going Beyond NFIP Minimums: State and Local Regulations." in *Flood Harmony: Proceedings of the Twelfth Annual Conference of the Assocation of State Floodplain Managers Association of State Floodplain Managers* (Natural Hazards Research and Applications Information Center Special Publication # 19 University of Colorado, Boulder, CO 1988) 15

Belt., C., Jr., "The 1973 Flood and Man's Constriction of the Mississippi River," 189 *Science* 681-84 (1975) 9

Brookes, A., *Channelized Rivers: Perspectives for Environmental Management* (1988) 7

Bullard, C., "High Herbicide Levels in Rivers After Flooding," *Des Moines Register* p. 17 (Sept. 10, 1993) . 10

Dunn, T. and L.B. Leopold, *Water in Environmental Planning* (1978) 5

Federal Interagency Floodplain Management Task Force, *Floodplain Management in the United States: An Assessment Report* . . . . . 3, passim

Goolsby, Donald A., William. A. Battaglin and E. Michael Thurman, *Occurrence and Transport of Agricultural Chemicals in the Mississippi River Basin, July Through August 1993*, U.S. Geological Survey Circular 1120-C (Washington, DC 1993) 10

House Report No. 1585, *reprinted in* 1969 *U.S. Code Cong & Ad. News* 2873 11

House Report No. 103-358, *reprinted in* 1993 *U.S. Code Cong & Ad. News* (Looseleaf Pamphlet No. 11A) 2545 7

Hoyt, William G. & Walter Langbein, *Floods* (1955) . . 5

Koenig, R., "Water Companies Seek Higher Ground: EPA Studying Problem of Inundated Plants," *St.*

Louis Post-Dispatch p.1 (Oct. 10 1993) 8

Koenig, R., and V. Tipton, "The Flood That Wasn't: A Computer Model Shows How the Flood of '93 Could Have Done Much More Damage -- Or Much Less," *St. Louis Post Dispatch*, Sec. B, p. 1 (Dec. 26, 1993) 9

Myers, M.F. and G.F. White, "The Challenge of the Mississippi Flood," 35 *Environment* 7 (1993) 7,8

National Academy of Sciences, National Research Council, Committee on Restoration of Aquatic Ecosystems, *Restoration of Aquatic Ecosystems: Science, Technology and Public Policy* (1992) 6

National Science Foundation, *A Report on Flood Hazard Mitigation* (1980) 5

Parrett, C., N.B. Melcher and R.W. James, Jr., *Flood Discharges in the Upper Mississipp Basin*, 1993, U.S.G.S. circular no. 112-A (Washington, D.C. 1993) 8

Senate Rep. No. 93-583, *reprinted in* 1973 *U.S. Code Cong & Ad. News* 3217 4,11

Thackston, Edward L. & Robert Sneed, *Review of Environmental Consequences of Waterway Design and Construction Practices as of 1979* (Tech. Report E-82-4, Office of Chief of Engineers USACE Waterways Exper. Station 1982) 7

U.S. Army Corps of Engineers, "Mississippi River

Flooding," *Association of State Wetlands Managers & Association of State Floodplain Managers Background Materials and Sourcebook: Workshop 2, Post Flood Recovery and the Restoration of Mississippi Basin Floodplains Including Riparian Habitat and Wetlands* (September 28-29, 1993) 8

U.S. Environmental Protection Agency, *Superfund Sites Affected by Flooding Region VII* (Aug. 2, 1993) 10

Zensinger, Larry, Coordinator of Midwest Flood Mitigation Projects, telephone communication (Feb. 13, 1993) 7

STATEMENT OF INTEREST

The Association of State Floodplain Managers (ASFPM) is an organization of professionals involved in floodplain management, flood hazard mitigation, the National Flood Insurance Program, and flood warning and recovery. Members include floodplain management officials from almost all states and many local governments, leaders from the research community in engineering, hydrologic forecasting and other fields, and the insurance industry. The Association supports comprehensive management of the nation's floodplains utilizing structural and nonstructural approaches to reduce loss of human life and property damage from flooding, to preserve the natural values of floodplains, and to avoid actions that exacerbate flooding. It has an interest in the floodplain easement condition in this case because the City of Tigard's comprehensive floodplain program is consistent with recommended practice.

SUMMARY OF ARGUMENT

Floods cause billions of dollars in annual damages. Although floods are natural events, floodplain damages are the result of human activities in floodplains. Floodplain development can result not only in loss of life and private property damage on land developed in floodplains but also social costs including fiscal impacts on taxpayers, increased flood damages elsewhere, and degradation of the adjacent river. For this reason, floodplain management regulations have become broadly established and significantly limit new development in floodplains.

Dolan's claim that a floodplain easement condition to permit channel improvement constitutes a Taking ignores the special contribution to flood problems caused by development in or adjacent to floodplains. Absent the channel improvement, expected development in Tigard would place much of Dolan's

property at risk of flooding. Dolan's proposed development would increase the value and physical extent of property subject to that flooding, with a broad range of consequences to Dolan and others. Tigard's comprehensive flood management program benefits Dolan by making developers throughout Tigard responsible for significant water storage to offset their increased stormwater. But that storage would not protect Dolan's property from large future floods. Dolan's land dedication therefore also primarily benefits Dolan because Tigard would use the area to modify the channel at public expense and thereby greatly limit Dolan's flood risk. Tigard's ordinance is also part of an integrated federal, state and local flood management program that provides Dolan benefits such as flood insurance and federal disaster relief.

ARGUMENT

I. FLOOD PROBLEMS AND THEIR MANAGEMENT IN THE UNITED STATES

A. *Extent, Nature and Causes of Flooding in the United States*

Floods are natural events that reflect the inherent large variability, both seasonal and annual, in precipitation and the patterns of water runoff from the landscape. Although floods are natural events, flood damages are human events that result from human activities in areas susceptible to flooding. Those activities have responded to a variety of human needs, including the need to be near water for transportation purposes, the search for fertile agricultural lands, and the general search for additional land for development in developing communities.

Although many needs for human activities in floodplains are compelling, the cost of our patterns of development have been high. Per capita deaths from flooding have remained fairly

constant, averaging 153.7 deaths per year per 200 million people from 1916 through 1940, 86.1 from 1941 through 1965, and 144.8 from 1966 through 1985. Federal Interagency Floodplain Management Task Force, *Floodplain Management in the United States: An Assessment Report* Vol. 2 at 3-16 (1992) (hereinafter *Interagency Floodplain Assessment*).[1] Property damages from floods have varied from year to year but have generally risen both in absolute terms and per capita. For example, the average annual damages from the period 1916 to 1960 in 1985 dollars were $592 million, while the annual average damages from 1951 to 1985 were $2.18 billion. *Id.* at 3-30.

The decision by a landowner to build in a floodplain of course exposes people who might use that development to harm. It can also have broad consequences for taxpayers and others who might be affected by flooding, and for public health and the environment.

Fiscally, floodplain development often leads to increased taxpayer expense. Governments have usually responded to floods with disaster aid. Because the federal government provides disaster aid through more than a dozen agencies and many separate funds,[2] the exact amount of federal aid provided

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[1] This report was compiled under the supervision of an interagency task force including the Federal Emergency Management Agency, the Departments of Agriculture, Army, Commerce, Energy, Housing and Urban Development, Interior and Transportation, the Environmental Protection Agency and the Tennessee Valley Authority. Much of this background discussion is taken from this comprehensive, recent source.

[2] A special appropriation for the Upper Mississippi flood last summer provided money to fourteen federal departments or independent agencies, and many of these departments received money for several separate services or agencies. *See* Emergency Supplemental

over the years is unknown. However, the President's Disaster Relief Fund spent more than $5.2 billion between 1965 and 1989 for flood related disasters. *Interagency Floodplain Assessment* at 3-23. Illustrating the significance of other payments, the Federal Highway Administration spent on average more than $100 million per year between 1986 and 1989 on disaster aid primarily for flooding although the Highway Administration is a relatively small disburser of disaster aid.[3] In addition to these costs, the federal government has provided much of the funding for structural flood control measures. Congress estimated in 1973 that the Army Corps of Engineers had spent $9 billion on flood works since 1936,[4] and the Corps has continued to devote roughly one billion dollars each year to flood control.[5] State and local governments have provided billions more in disaster aid and flood control protection.

Physically, development in floodplains can increase the areal

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Appropriations for Relief from the Major Widespread Flooding in the Midwest Act of 1993, P.L. 103-75, 107 Stat. 739 (1993).

[3] In the Mississippi special flood appropriation, the Highway Administration received up to $175 million out of a total disaster budget of approximately $6 billion. *Id.*

[4] Senate Rep. No. 93-583, *reprinted in* 1973 *U.S. Code Cong. & Ad. News* 3217, 3219.

[5] Between 1983 and 1992, the Army Corps of Engineers received annual appropriations of never less than $673 million and generally more than $800 million for new flood control construction. *Annual Report Fiscal Year 1992 of the Secretary of the Army on Civil Works Activities* (1 October 1991 -30 September 1992, Vol. II (summary statistics listed on back of front cover). By 1983, it was also devoting roughly $200 million annually to maintaining flood control works. *Interagency Floodplain Assessment* at 12-6.

extent, or destructiveness, of flooding elsewhere.[6] These effects can occur in many ways. Development can directly displace the natural storage capacity of floodplains. That probably means that floodwaters move more rapidly downstream, increasing the size, velocity and therefore destructiveness of flood peaks. Alternatively, constriction of the floodway (the portion of a floodplain that during a flood tends to maintain relatively deep, faster moving water) tends to cause increased flooding upstream. It creates a bottleneck that slows water down and that backs water up much the way traffic bottlenecks cars.

Development can also lead indirectly to flooding elsewhere because people in floodprone areas tend to demand structural means of controlling flooding.[7] Floodwalls and levees essentially wall a river away from its floodplain. Stream channelization allows streams to convey more water rapidly downstream and therefore allows less floodwater to build up and spread out into the floodplain. Dams and reservoirs increase water storage and therefore can decrease the volume of floodwaters. Although all these techniques can be effective in limiting flooding in particular areas, they inherently involve the displacement of water from some locations to others and therefore have the potential to increase flooding elsewhere. For example, building levees on one side of a river will increase flooding on the other

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[6] Limiting some of these impacts is a key requirement of National Flood Insurance Regulations. *See infra* at 14. For a general discussion of the impacts discussed in this and the following paragraph, see T. Dunn & L.B. Leopold, *Water in Environmental Planning* (1978).

[7] For amplification of the discussion in this paragraph, see Dunn & Leopold, *supra*; William. G. Hoyt & Walter Langbein, *Floods* (1955); National Science Foundation, *A Report on Flood Hazard Mitigation* 15 (1980).

side and possibly downstream. For that reason structural flood control measures need to be integrated both with each other and with non-structural flood control measures.

Floodplain development also can have a range of severe public health and other environmental impacts. Ecologically, "rivers and their floodplains are so intimately linked that they should be understood, managed and restored as integral parts of a single ecosystem."[8] Floodplains, particularly those areas fairly frequently flooded, tend to serve as key sources of food supply, or as spawning grounds, for fish or other river life. River water quality also often depends on floodplain areas because floodplain vegetation and soils often filter out pollutants as floodwaters move over them, or as water moves toward rivers. This filtration function applies not merely to pollutants added by man but to sediment and nutrient inflows that occur naturally and that are kept in balance in part by floodplain biological activity. The natural vegetation in floodplains also serves to hold down sediment that otherwise can erode into streams, affecting the penetration of light or smothering bottom-dwelling life. In addition, the very manner in which floodplains receive, store or convey flood flows means that they physically control seasonal patterns of water flow. Those patterns themselves have a pronounced impact on aquatic life, for the amount of water moving through a stream often determines suitability for spawning, rearing or migratory behavior, and aquatic life has evolved to rely on specific patterns.

Development in floodplains not only eliminates these

[8] National Academy of Sciences, National Research Council, Committee on Restoration of Aquatic Ecosystems, *Restoration of Aquatic Ecosystems: Science, Technology and Public Policy* 184-85 (1992). The following paragraph summarizes discussion *id.* at 165-206 and 265-277; *see also Interagency Floodplain Assessment* at 2-1 through 2-17.

important natural interactions between the main river channel and its floodplain, but development also brings a new source of human pollutants into areas that are exposed to floodwaters. During floods, these pollutants can pose significant health risks. In addition, measures such as channels, levees and dams designed to protect structures from flooding tend to further disturb the natural patterns of water flow. As a result, alterations of floodplains, or dams and levees used to control and redirect floodwaters, can result in pronounced degradation of natural river and estuarine systems.[9]

Flooding in the Upper Mississippi basin in the summer of 1993 illustrates all these qualities of flooding and floodplain development. The 1993 flood inundated over 17,000 square miles of the Upper Mississippi River basin in nine states.[10] It caused damages roughly estimated at 12 billion.[11] It dislocated at least 82,000 families, of whom many remain dislocated.[12] An estimated 527,000 lost drinking water in 33 separate

[9] In addition to the National Research Council study above, other good discussions include A. Brookes, *Channelized Rivers: Perspectives for Environmental Management* (1988); Edward L. Thackston & Robert Sneed, *Review of Environmental Consequences of Waterway Design and Construction Practices as of 1979* (Tech. Report E-82-4, Office of Chief of Engineers USACE Waterways Exper. Station 1982).

[10] House Report No. 103-358, *reprinted in* 1993 *U.S. Code Cong & Ad. News* (Looseleaf Pamphlet No. 11A) 2545, 2546.

[11] M.F. Myers & G.F. White, "The Challenge of the Mississippi Flood," 35 *Environment* 7, 25 (1993).

[12] Telephone communication with Larry Zensinger, Coordinator of Federal Emergency Management Agency for Midwest Flood Mitigation Projects (Feb. 13, 1993).

communities,[13] and many other people's lives were disrupted by alterations in transportation or by economic dislocations.

Like flooding generally, the 1993 flood was also not unprecedented. The Upper Mississippi River basin suffered from severe floods in 1880, 1917, 1927, 1947, 1951, 1952, 1960, 1965, 1969, 1973, and 1978.[14] Moreover, although peak discharge volumes were higher in 1993 at many sites than previously recorded, much damage occurred in areas in which peak discharges were of a volume expected to occur as often as every ten or twenty-five years.[15] The total volume of water involved in the flood was 20% less than the total volume involved in a flood measured in 1844. *Id.*

The fiscal impact of the flood is reflected in Congressional appropriations of approximately $6 billion in emergency relief for the flood. *See supra* note 2. Those funds are in addition to many more millions payable from the federal flood insurance program or by states and localities.

The flood also illustrates the potential impact that flood

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[13] R. Koenig, "Water Companies Seek Higher Ground: EPA Studying Problem of Inundated Plants," *St. Louis Post-Dispatch* p. 1 (Oct. 10 1993).

[14] U.S. Army Corps of Engineers, "Mississippi River Flooding" *in* Association of State Wetlands Managers & Association of State Floodplain Managers, *Background Materials and Sourcebook: Workshop 2, Post Flood Recovery and the Restoration of Mississippi Basin Floodplains Including Riparian Habitat and Wetlands* (September 28-29, 1993).

[15] C. Parrett, N.B. Melcher, & R.W. James, Jr., *Flood Discharges in the Upper Mississippi Basin*, 1993, U.S.G.S. circular no. 112--A (Washington, D.C., 1993) (results reprinted in Myers & White, *supra* at 26.)

control structures have on flooding elsewhere, particularly if not integrated into an overall system. The Upper Mississippi basin contains more than six thousand miles of levees, many large dams, and thousands of miles of channelized streams which have evolved without common plan or analysis. *See* U.S. Army Corps of Engineers, *supra*. Although findings regarding individual floods have been controversial, hydrologists have claimed that these levees increase the magnitude of flooding downstream by eliminating floodplain storage.[16]

The Mississippi region and this flood also illustrate the health and environmental impacts of floodplain development. For example, floodwaters rushing over agricultural lands polluted the Mississippi and tributaries with large quantities of pesticides and eventually caused a massive atrazine bloom in the Gulf of

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[16] In a famous paper, Charles Belt, Jr., estimated that flood levels in St. Louis during the 1973 flood were several feet higher as a result of the construction of levees along the Upper Mississippi and Missouri Rivers upstream. C. Belt., Jr., "The 1973 Flood and Man's Constriction of the Mississippi River," 189 *Science* 681-84 (1975). Studies have come to similar conclusions regarding the 1993 flood. R. Koenig & V. Tipton, "The Flood That Wasn't: A Computer Model Shows How the Flood of '93 Could Have Done Much More Damage -- Or Much Less," *St. Louis Post Dispatch*, Sec. B, p. 1 (Dec. 26, 1993).

Mexico.[17] In addition, the flood brought into the river contamination from many hazardous waste sites and other toxic pollutants from common facilities such as gasoline stations.[18]

B. *Evolution of Contemporary Floodplain Management: The Multi-Faceted Strategy That Attempts To Limit Flood Damage Exposure*

During the latter part of the nineteenth century and the first part of the twentieth century, national flood control policy revolved primarily around the construction of structural flood control methods by individual projects -- projects authorized generally after a major flood disaster.[19] In 1942, Dr. Gilbert White first expressed modern theories of floodplain management in a famous dissertation. These theories became national policy in 1966 through the release by a Presidential task force of "A

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[17] Two studies found these high pesticide levels. One at the University of Iowa is reported in C. Bullard, "High Herbicide Levels in Rivers After Flooding," *Des Moines Register* p. 17 (Sept. 10, 1993). A study by the United State Geological Survey is reported in Donald A. Goolsby, William. A. Battaglin & E. Michael Thurman, *Occurrence and Transport of Agricultural Chemicals in the Mississippi River Basin, July Through August 1993*, U.S.G.S. Survey Circular 1120-C (Washington, D.C. 1993).

[18] For example, the U.S. Environmental Protection Agency identified 24 Superfund sites affected by flooding. U.S. Environmental Protection Agency, *Superfund Sites Affected by Flooding Region VII* (Aug. 2, 1993).

[19] Discussion of the evolution of floodplain management policy is set forth in *Interagency Floodplain Management Assessment*, chapter 4.

Unified National Program for Managing Flood Losses," House Document 465, and through Executive Order 11296. The basic concept underlying these documents was that flood damages arose from the placement of human activities in the way of floods. Those activities occurred sometimes for good reasons and sometimes for irrational reasons that reflected lack of knowledge, subsidies or other interferences with rational decisionmaking. These policies called for efforts to assure "the most effective use of floodplains" through a range of flood management measures: flood proofing of structures through techniques like elevation, limitations on development in floodplains, judicious use of structural flood control measures, emergency measures, public relief and insurance.

Congress insured the broad implementation of these ideas by adopting national flood insurance in 1968 and by strengthening the program in 1973.[20] In significant part, Congress was motivated by fiscal concerns, which included mounting costs for disaster aid and federal flood control projects,[21] and flood

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[20] Pub. L. 90-448, Title XIII, 82 Stat. 572 (1968) and Pub. L. 92-234, 97 Stat. 975 (1973) (codified as amended at 42 U.S.C. Sec. 4001-4128).

[21] *See* H.R. No. 1585, *reprinted in* 1969 *U.S. Code Cong & Ad. News* 2873, 2967 (insurance designed to "reduce the mounting federal expenditures for disaster relief assistance"); S. Rep. No. 93-583, *reprinted in* 1973 *U.S. Code Cong & Ad. News* 3217, 3218-3219 ("In recent years the Federal Government has assumed more responsibility for providing relief and for partial indemnification for property losses resulting from floods. In addition to relief, the Federal Government has spent large sums of money for flood prevention. The cost to the Federal Government as a result of these disasters has been massive.")

damage to federally subsidized development.[22] Congress also believed that these subsidies effectively encouraged floodplain development.[23] But Congress recognized that private insurance was not normally available because of the high risk. The quid pro quo for continuing to provide disaster aid and structural flood control, and for making insurance available, was to require that localities adopt strict land use controls to limit flood damages. *See* 42 U.S.C. Sec. 4002(b)(3).

Not long after adoption of federal flood insurance,

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[22] Sec. 2(a)(3) of Pub. L. 93-234, 87 Stat. 975 (1973), 42 U.S.C. Sec. 4002(a)(3) (1992).

[23] See 42 U.S.C. Sec. 4002(a)((1)(2) (finding accelerating disaster costs in part because of federal subsidies). In the legislative history, Congress quoted with approval a report by the Secretary of Housing and Urban Development.

> In spite of the flood protection programs of the past 30 years, the average annual flood hazard is now greater than before such programs began, because people have moved themselves and their property into flood-prone areas faster than flood-protection works have been built. Many factors have been responsible for this development of flood-prone areas--the general growth of population, income, and wealth among others; but it is also clear that the substantial separation of costs from benefits--whereby the general public bears most of the costs of flood-protection works while individual members primarily receive the grants--has been a major factor encouraging such development.

S. Rep. 93-583, *reprinted in* 1973 *U.S. Code Cong. & Ad. News* at 3219.

Presidential Executive Order 11988 on Floodplain Management[24] in 1977 established a national policy "to avoid direct or indirect support of floodplain development wherever there is a practicable alternative." The reasons reflected concern in part with the risk of flooding posed even by development in compliance with FEMA standards. This policy also reflected the desire to avoid the environmental risks posed by floodplain development.

Reflecting similar concerns, Congress and states have passed a variety of laws designed to protect against the environmental degradation that tends to accompany certain kinds of development in floodplains.[25]

These national policies have resulted in the nationwide regulation and limitation of land development in floodplains. By 1990, 18,023 (82%) of 20,506 communities with floodprone areas had adopted ordinances that at least complied with minimum federal regulatory requirements. *Interagency Floodplain Assessment* at 6-23.

Flood insurance regulations of the Federal Emergency

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[24] 47 Fed. Reg. 26951 (May 24, 1977).

[25] Many of these laws are summarized in Chapter 14 of the *Interagency Floodplain Assessment.* Some important regulatory laws which have widespread state and local equivalents, include: §404 of the Clean Water Act, 33 U.S.C. §1344 (1992) (regulating fill in wetlands, rivers and harbors); Coastal Zone Management Act, 16 U.S.C. §1451-1464 (1992) (requiring state comprehensive coastal zone management plans to address water quality protection, erosion, preservation of key natural functions among other impacts of coastal development); Food Security Act of 1985 ("Swampbuster"), 16 U.S.C. §3821-3824 (1992) (denying agricultural benefits to farmers who convert wetlands); Wild and Scenic Rivers Act, 16 U.S.C. §1271-1287 (1992) (limiting federal activities and federally authorized activities that would impact designated wild and scenic rivers).

Management Agency set the minimum standards for these almost nationwide floodplain ordinances.[26] FEMA's requirements are based on the 100 year flood and the 100 year floodplain. The 100 year flood is the flood estimated to have a 1% chance of occurring in any given year. The floodplain is the area estimated to be inundated in such a flood.

FEMA rules divide this floodplain into the floodway and the floodfringe. A view from the air of a flooded river typically reveals a portion of the floodplain with relatively deep water that moves rapidly downstream. If constricted, this "floodway" area will not convey water rapidly and will cause water upstream to back-up and flood more area. To prevent development from increasing flooding at all, there should be no constriction of the floodway. FEMA, however, actually establishes a more limited "regulatory floodway," which is the area that if constricted will cause no more than a one foot rise in flood levels. In this area, FEMA rules require that ordinances prohibit any development that would increase flood waters, and that essentially prohibits all conventional structural development.

The floodfringe occupies the remainder of the 100 year floodplain outside the floodway. Mechanically, the floodfringe stores floodwaters but does not convey the water. Development in the floodfringe therefore can displace flood storage and can increase floodwaters downstream but will generally not increase flooding upstream. In the 100 year floodfringe, residential structures must be elevated either on stilts or mounded earth to the highest flood level, and commercial structures must be

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[26] For a good summary of FEMA regulations, see *Interagency Floodplain Assessment* at 11-4 through 11-10. Regulations are set forth at 44 C.F.R. Parts 59-77. Key sections include §59.1 (defining "area of special flood hazard" and "regulatory floodway"); §59.22 (setting forth basic community requirements for participation in the program); §60.3 (setting forth minimum substantive standards).

elevated or made watertight through special construction.

Both of these rules apply only to new development. However, under FEMA rules, ordinances also require that any substantial improvement to a structure, or any reconstruction after substantial damage, must bring a structure up to code. 44 C.F.R. 60.3(c)(d) (1993). This requirement reflects the policy that improvements increase flood damage exposure, and therefore social and fiscal costs.

Although the regulations establish minimum ,standards, FEMA rules encourage and require communities to consider the adoption of specific tougher standards. *See* 44 C.F.R. §60.2; *see also* §60.1(d) (stating that "more restrictive" regulations are "encouraged"). FEMA will provide insurance rate discounts of up to 45% in communities that adopt stricter standards. *Interagency Floodplain Assessment* at 11-9,11-10. ASFPM members have also expressed strong encouragement for localities to adopt tougher standards tailored to local needs.[27] In doing so, they have expressed many reasons. FEMA minimum standards themselves do not preclude damage during the 100 year flood: The standards permit development to cause a one foot rise in flood levels and the standards do not require structures to insulate themselves from those potential flood levels. In addition, floods greater than the 1% annual chance flood are still possible, and, in fact, 30% of all flood damages occur outside the 100 year floodplain. *Interagency Floodplain Assessment* at 15-11. FEMA standards also do not map floodplains based on

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[27] For a summary of ASFPM views, see "Workshop #3: Land Use Regulations Going Beyond NFIP Minimums: State and Local Regulations," & "Workshop 8: Land Use Regulations II," in *Floodplain Harmony: Proceedings of the Twelfth Annual Conference of the Association of State Floodplain Managers* (Natural Hazards Research and Applications Information Center Special Publication #19, Boulder, Colorado 1988).

projected increases in levels as a result of future development. Increased drainage that results in the so-called "build-out" condition increases the area subject to flooding.

According to 1988 and 1992 state surveys by ASFPM, most states and localities have taken this advice and adopted ordinances that are stricter at least in some ways than FEMA requirements. *Interagency Floodplain Assessment* at 11-21--11-27. As of 1992, twenty-five states had floodway ordinances more stringent than FEMA standards. Association of State Floodplain Managers, *Floodplain Management 1992: State and Local Programs* 16 (1992) (hereinafter *Floodplain Management 1992*). Twelve states had established wider floodways by permitting no rise in flood levels or smaller than one foot rises. *Id.* As of 1988, Montana, Wisconsin, Indiana, Michigan and Washington prohibited either any new buildings or new residences in the floodway, and Arizona and Utah also had special limitations on building in floodplains. *Interagency Floodplain Assessment* at 11-22. In addition to these state standards, an unknown but clearly large number of communities have adopted stricter local ordinances. One survey by the Atlanta FEMA regional office in 1987 identified 236 communities in eight states that had established standards beyond FEMA requirements. *Id. at 11-21.* A partial survey by the Association of State Floodplain Managers revealed localities in Vermont, Wisconsin and Ohio that have prohibited any permanent development in the floodplain. *Floodplain Management 1992* at 16. Many states also identify their regulatory 100 year floodplains using not present conditions, as allowed by FEMA, but increased flood conditions likely to result from projected increases in development. *Interagency Floodplain Assessment* at 6-28.

II. THE CITY OF TIGARD'S COMPREHENSIVE FLOOD MANAGEMENT SYSTEM IS CONSISTENT WITH NATIONAL POLICY.

The City of Tigard commissioned a comprehensive flood study in 1978, which would assist Tigard to enter the national flood insurance program. *Master Drainage Plan City of Tigard* (R-Doc No. F at cover letter and 9-1). Under FEMA regulations, Tigard was not only required to adopt an ordinance meeting FEMA minimum standards, but also to consider adopting certain additional standards. These included regulations that would address "[a]dverse effects of flood plain development on existing development," "[i]mprovement of local drainage to control increased runoff that might increase the danger of flooding to other properties," and "[p]rohibition of any alteration or relocation of a watercourse, except as part of an overall drainage basin plan." 44 C.F.R. Sec. 60.22(c)(4)(9)(13). In addition, Tigard had to consider "flood plain management regulations" beyond minimum requirements that would "[p]ermit only that development of flood-prone areas which (i) is appropriate in light of the probability of flood damage and the need to reduce flood losses, (ii) is an acceptable social and economic use of the land in relation to the hazards involved, and (iii) does not increase the danger to human life." 44 C.F.R. Sec. 60.22(a)(1).

Tigard's consultants made a comprehensive analysis of present and potential future flood problems using engineering studies and Corps of Engineers floodplain maps. The study concluded that flooding already occurred regularly in Fanno Creek and that existing and new development both in and near the floodplain of Fanno Creek faced increased risk. The reason was "that tremendous increases in impervious area are expected to occur within the Fanno Creek basin" by no later than the year 2000. *Master Drainage Plan* at 5-1. These increases would mean that the 100 year floodplain would effectively become the

ten year floodplain, and flows during the 100% floodplain were expected to increase by 28.7% at Dolan's location along Fanno Creek.[28] That would cause severe increased flooding in downtown Tigard beyond the existing 100 year floodplain. *Id.* at 4-5, 5-14. The report also found that existing and future development were and would contribute to serious water quality degradation through stormwater runoff. *Id.* at 4-20.

To address these problems, the *Master Drainage Plan* included a mixture of structural and non-structural controls in keeping with FEMA recommendations. First, the master plan recommended continued restrictions on development in floodplains, particularly in key drainage areas. *Id.* at 9-1. To limit the flows generated by additional development, the drainage plan recommended specific requirements for new development to increase water storage and thereby limit increases in discharges by storing water generated in the so-called 25-year flood. *Id.* at 7-9, 7-10. But determining that such storage would be ineffective against the 100-year flood, *id.* at 7-9, the plan recommended channel modifications along Fanno Creek that would allow the Creek to handle and convey these increased flows, and even to improve on existing flood conditions. *Id.* at 6-8.

Tigard has implemented this comprehensive plan with zoning and land use rules that distinguish two kinds of impacts. One is the impact from the increased stormwater caused by any new development. Developers meet these responsibilities through stormwater controls or impact fees. But the other impact is the increased exposure to flooding caused by development near the existing 100 year floodplain, which, absent structural improvements to the flood channel, would be exposed

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[28] The Dolan's building is off Southwest Main Street, and estimates for increased peak flows are provided for this site on page 5-5 of the *Master Drainage Plan*; see also *id.* at 5-3.

to flooding in the future. (Many states, faced with this problem, increase the size of the floodplain subject to restrictions.) See *supra* at 16. Consistent with FEMA recommendations, Tigard addressed this increased exposure by a requirement not to build in the *existing* 100 year floodplain, and a requirement that developers permit the City in certain areas to improve those channels to prevent future flooding. In doing so, again as urged by FEMA rules, Tigard considered what development would be "appropriate" and "economical" in light of flood damages. Tigard found these restrictions appropriate in part because the 100 year floodplain area was "virtually unusable due to the year-round water flow of the Creek." *Final Order of the City of Tigard* at 29 (Pet. App. G.)

III. TIGARD'S DEVELOPMENT CONDITION DOES NOT CONSTITUTE A TAKING.

A. *Tigard's Regulation Satisfies* Nollan

1. Nollan *simply requires that easement conditions mitigate the impacts of development.*

If Tigard had done no more in this case than prohibit Dolan from building in the floodplain, nothing in the record would suggest any serious taking question. Dolan has not even alleged a severe economic impact, let alone the denial of all economically viable use held a taking in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). The regulation would serve some of the highest governmental purposes, including protection of human life and property, as well as protection against a variety of environmental harms.[29]

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[29] *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (regulation at least much less likely to be taking if

The regulation would be consistent with setback regulations upheld by this Court long ago. *See Gorieb v. Fox*, 274 U.S. 603 (1927). In addition, any interference with reasonable investment-backed expectations is slight because of the now substantial history and common nature of development prohibitions or severe restrictions in floodplains, as discussed above.[30] For these reasons, courts have overwhelmingly rejected takings challenges to floodplain regulations.[31]

serving these purposes). Although *Lucas* indicated that the prevention of these kinds of impacts in and of itself does not justify a regulation that denies all economically viable use, prevention of such impacts continues to be a strong factor in the determination that a regulation does constitute a taking. *See* cases cited in *Lucas*, 112 S. Ct. at 2897.

[30] *See Concrete Pipe & Productions of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2291 (1993) (holding that those who engage in economic activities in a highly regulated field do not have a reasonable expectation against a change in that regulation and citing many cases).

[31] *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732 (5th Cir. 1988) (holding that FEMA land use regulations were not taking as a matter of law); *Texas Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025 (D.D.C. 1978), *aff'd mem.*, 598 F.2d 311 (D.C. Cir.), *cert. denied*, 444 U.S. 927 (1979); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 258 Cal. Rptr. 893 (Cal. App. 1989) (upholding development prohibition in floodplain); *April v. City of Broken Arrow*, 775 P.2d 1347 (Okl. 1989) (upholding ordinance regulating development in floodplain); *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E.2d 204 (1983) (upholding floodplain regulations); *Town of Idialantic v. McNulty*, 400 So.2d 1227 (Fla. App. 1981) (upholding dune protection setback ordinance in part because of flood hazard); *Usdin v. State Department of Environmental Protection*, 173 N.J. Super.

This case raises questions because the City of Tigard has required that Dolan provide an easement on her land for flood protection improvement at public expense, specifically through widening of the river channel.[32] Physical invasions or occupations enjoy special constitutional protection because they go to the heart of the Just Compensation Clause. *See Loretto*

311, 414 A.2d 280 (1980) (upholding state prohibition against structures in floodway); *Pope v. City of Atlanta*, 242 Ga. 331, 249 S.E.2d. 16 (1978), *cert. denied*, 440 U.S. 936 (1979) (upholding impervious cover restriction in floodplain prohibiting tennis court); *Foreman v. State Department of Natural Resources*, 180 Ind. App. 94, 387 N.E.2d 455 (1979) (upholding prohibition from making fill deposits in a floodway); *Krahl v. Nine Mile Creek Watershed District*, 283 N.W.2d 538 (Minn. 1979) (upholding encroachment limitations in floodplain); *Maple Leaf Investors, Inc. v. State Dept. of Ecology*, 88 Wash. 2d 726, 565 P.2d 1162 (1977) (upholding denial of a permit for proposed houses in floodway because of danger to persons and to property downstream); *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972) (upholding ordinance limiting floodplain use to parks and agriculture); *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973) (upholding regulation limiting floodplain to open space uses against taking claim despite testimony that land reduced in value by more than 85%); *Spiegle v. Beach Haven*, 46 N.J. 479, 218 A.2d 129 (1966) (upholding setback ordinance in coastal area against taking claim). *But see Dooley v. Town Plan & Zoning Comm'n*, 151 Conn. 304 197 A.2d 770 (1964) (taking where floodplain zoning greatly reduced value of land).

[32] Because the rationale behind the Nollan nexus test was the effort to prevent physical invasions by subterfuge, ASFPM agrees with lower court decisions that the test applies only to exactions that involve physical encroachment of land. *See, e.g., Commercial Builders v. Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991).

v. *Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 426, 102 S. Ct. 3164, 3171 (1982). Yet, this Court has made clear that an easement condition does not itself constitute a physical taking because the "government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 112 S. Ct. 1522, 1528 (1992) (emphasis in original).

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court attempted to insure that governments would not use easement conditions to accomplish physical invasions by subterfuge. It did so in two ways. First, it required a reasonable nexus between the legitimate government interest pursued by the regulatory restrictions and the easement condition. Second, *Nollan* made clear that the desire "of obtaining an easement to serve some valid governmental purpose but without payment of compensation" is not in and of itself a legitimate public interest. *Id.* at 837. The valid public purpose necessary to warrant an easement condition in a development permit must involve mitigating an impact caused by the development.[33]

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[33] The ASFPM does not believe that an easement condition is constitutional only if an absolute prohibition on development would itself not be a taking. For example, localities routinely require urban developers to make sidewalks available for public use to prevent negative impacts on pedestrian traffic. That condition should not constitute a taking even if a blanket building prohibition might, in some circumstances, constitute a taking. The economic impact of the easement condition is simply far less, and far more proportional to the impacts of the development, than a blanket prohibition. It therefore is warranted for less compelling reasons. *See Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring and dissenting) (suggesting need only for "cause-and effect" relationship between dedication condition and problem caused by development).

ASFPM also does not believe that stricter scrutiny of legislative

2. *Tigard's easement conditions meets the Nollan test because it mitigates increased exposure to flood damages.*

Dolan's request to increase development would impact flooding and water quality problems in two potential ways. First, like development anywhere in the watershed, the development would increase stormwater flows, with flooding and water quality impacts. Second, and more importantly for the purposes of this case, the development would increase the property exposed to damage from flooding. It would do so even though expected development throughout Tigard would apparently put Dolan's property at risk of the 100 year flood.[34]

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reasoning than established by the due process clause is necessary to protect property rights. *Nollan* explicitly applied only a rational basis scrutiny, 483 U.S. at 838, and this Court recently stated that if "due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violating the Takings clause." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2289 (1993) (quotation citation omitted). The due process clause and Just Compensation clause treat easement conditions differently not through the standard of scrutiny but through the definition of legitimate public interest. Under the due process clause, obtaining an easement for public access can be valid for a full range of public purposes. But under the Takings clause, obtaining an easement without compensation through a development condition is only valid if the easement serves the purpose of mitigating the impact of the development, or, correlatively, provides benefits to the development.

[34] The Master Drainage Plan (R-Doc No. F, at 4-5) predicted severe increased flooding around Southwest Main Street, Dolan's address, as a result of increased flows accompanying development. The predicted flood elevations of approximately 152.5

Dolan's claim that the easement dedication condition does not relate to impacts of Dolan's development requires that this Court ignore the distinction between property in or adjacent to floodplains and property that itself is at no risk of flooding. The floodplain easement dedication was designed to address the increased property damage likely to result from Dolan's expanded development in a floodprone area. To address that problem, Tigard undertook in large part at public expense to improve the flood carrying capacity of the original 100 year channel. Although Dolan and other floodplain landowners were required to donate the property, the City picked up the substantial expense of the channelization work itself. The *Master Drainage Plan* indicated this strategy was the cheapest way for Tigard to guard against the increased flood damages likely to result from Dolan's development.

B. ***The Floodplain Easement Requirement Was Not So Disproportionate As to Imply Subterfuge.***

1. *Dolan's proposed development would receive many special benefits from Tigard's comprehensive flood management system, which includes the easement.*

Dolan also argues that the requirement for a floodplain easement fails for lack of proportionality. Although, as discussed below, ASFPM disagrees with Dolan's test for proportionality, it agrees that *Nollan's* nexus test includes some notion of proportionality. Even if an easement serves the

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feet in figure 6-3 without channel improvements indicates that Dolan's planned property at the same elevation would be flooded but would not be flooded with channel improvements that would lower flood levels by approximately five feet.

purpose of mitigating a development impact, the burden imposed on the landowner could be so disproportionate to the burden on the community that courts might safely treat a development condition as a subterfuge for obtaining the easement.

In this case, the facts support no such inference. A notion of proportionality requires a comparison of the potential burden imposed by Dolan's new development and the net burden of the condition on Dolan. But the "net burden" on Dolan must include costs offset by special benefits. Viewed this way, the record suggests that Dolan actually received significant net benefits.

The reason is simple: Dolan and other landowners in and adjacent to the floodplain are the primary beneficiaries of Tigard's comprehensive floodplain management system to reduce the risk of flooding. If Tigard took no action, development would not only expose areas now in the floodplain to regular flooding, but much of the remainder of Dolan's property would also be subject to the 100 year flood. See note 34 *supra*. Dolan might have a theoretical common law claim against all landowners in the Fanno Creek watershed who helped to increase flood flows. But as a practical matter, common law litigation to address a problem caused only as a result of the cumulative actions of many landowners would be difficult, if not impossible. Instead, Tigard's comprehensive plan did make all watershed developers responsible for managing stormwater to the limit of the 25 year flood. That benefits Dolan although it cannot protect her from longer floods. Tigard therefore required Dolan and other new developers to contribute a few feet of property. In return, Tigard would pay to channelize not only Tigard's floodplain area but adjacent areas to keep the remainder of Dolan's property out of the floodplain.

Dolan also benefits from Tigard's comprehensive plan because it makes Dolan eligible for the federal flood insurance program (and may make Dolan eligible for reduced insurance rates). That eligibility on the community level also

automatically makes Dolan eligible for federal disaster assistance.

On the cost side, Dolan's proposed new development would itself not only increase flood flows, but it would greatly increase the amount and value of property exposed to flood damages. As discussed above, that exposure has significant potential impacts on flood levels up and downstream, and on water quality.

Ultimately, the costs of flood protection must be split among many different kinds of landowners: those with existing development outside the floodplain, those with new development outside the floodplain, those with existing development inside or adjacent to the floodplain, and those with new development in that area. Dolan is in the last category, and there is no reason to believe the easement demanded of her is disproportionate to the burdens and benefits she receives from the flood management system.

> 2. *The suggestion that proportionality be quantified has no practical meaning because apportioning responsibility for preventing flood damages inherently involves social judgments.*

To assist her proportionality argument, Dolan contends that the City must show a precise, quantifiable, proportionality between the impact of a development and the development condition. The first problem with this argument is that it begs the question of what exactly should be quantified. Dolan seems to suggest that there must be a quantitative equality between the amount of runoff water generated by a development and the amount of water that would be controlled by the channel improvement. But that is a physically meaningless comparison.

The purpose of a channel improvement is not to store water but to convey it rapidly downstream and out of the problem area. It will convey floodwaters from a wide variety of sources, and the amount of conveyance will therefore be far greater than the amount of runoff from any one site. But that does not

represent a huge contribution by each individual channel area improved because the utility of a channel improvement at any one point depends on the utility of the adjacent channel. There is little value, and generally a problem, in conveying water more rapidly through one portion of a stream if the downstream portion lacks the same conveyance capacity because that would simply mean more flooding at the point of bottleneck. Any one channel area only makes a small but necessary contribution to the utility of the channel as a whole. There is no obvious way to compare the improved utility of any portion of a channel with the amount of increased runoff from one particular site.

More fundamentally, Dolan's argument makes little sense because water alone does not create a flooding problem. Floods are a natural development, but a flood problem requires, first, floodwaters, and second, a human structure or other use in the path of the flood that can be damaged. Both the person who builds in a floodplain and the upstream developer contribute to a flooding problem. Who contributes more to a flooding problem -- and who benefits more from an effort to decrease a flooding problem -- depends not on any question of science but on a determination of social responsibility. Tigard's ordinance assigned significant responsibility to both based largely on practical engineering considerations. Those kinds of determinations are exactly the kind that governments, rather than courts, are given the primary assignment of making.

> 3. *A requirement for perfect equality in benefits and burdens would unduly constrain local officials from utilizing broader criteria of fairness.*

Dolan's notion of proportionality also legally errs because the Takings clause does not prohibit land use regulations from any disproportion in benefits and burdens. Floodplain ordinances often attempt a rough equality in benefits and burdens. But Dolan's argument would excessively limit the discretion of local

officials to utilize notions of fairness that might involve some redistribution of benefits. For example, floodplain management rules typically impose lesser burdens on existing development out of respect for their reliance on preexisting regulatory schemes. Respecting this governmental role, this Court has therefore rejected Dolan's underlying contention. As it stated in *Yee v. City of Escondido*, 112 S. Ct. 1522, 1529 (1992):

> Petitioners emphasize that the ordinance transfers wealth from park owners to incumbent mobile home owners. Other forms of land use regulation, however, can also be said to transfer wealth from the one who is regulated to another. Ordinary rent control often transfers wealth from landlords to tenants by reducing the landlords' income and the tenants' monthly payments . . . . Traditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline but the value of his neighbor's property may rise. . . . [T]he existence of the [wealth] transfer in itself does not convert regulation into physical invasion.

Indeed, it would be strange if the Constitution, through the Takings clause, prohibited any redistribution in wealth through regulation when it effectively authorizes explicit, direct redistributions in wealth through the real estate taxing system based on a broad array of legislative judgments of fairness. *See, e.g., Nordlinger v. Hahn*, 112 U.S. 2326 (1992) (upholding tax system that resulted in large discrepancies in real estate taxes based on the time of purchase of the property).

C. *Requiring Development Conditions Based on Pre-existing Plans Permits Development Impacts to be Mitigated More Efficiently and Fairly.*

Dolan claims that an inference of subterfuge is warranted because the floodplain easement (and bicycle path easement) were designed to implement a common, general design, and were not developed specifically as a response to the burdens imposed by Dolan's proposed development. For example, Dolan claims that the bicycle path easement and development restriction purpose are unrelated because the increased traffic caused by Dolan's type of retail store is not likely to be bicycle traffic.

But a comprehensive plan does not suggest subterfuge. To the contrary, comprehensive planning provides an efficient means of addressing the infrastructure demands of new development at the lowest possible cost. If each development had to develop its own flood control and transportation system, unconnected to the system developed around it, the result would be costly and chaotic.

For example, although this brief does not generally address the transportation easement, imagine if, as suggested by Dolan, the transportation infrastructure required of each developer had to relate directly to the predicted form of traffic likely for that development. A lumber store might invite customers with trucks, a supermarket customers in cars, and a health food store customers on bicycles. Dolan's argument would lead to a truck road, connected to a car road, connected to a bicycle path.

Similarly, the most efficient flood management system requires that channels remain unblocked and be capable of receiving the full water flowing into a portion of a channel from upstream. The alternative would be large flows feeding water into more constricted areas so that the system could actually increase flood problems. Flood management systems can only work if the flow discharge and conveyance systems on each property are intelligently integrated.

Not only is comprehensive flood management more efficient, it is also more accurate and more fair. A comprehensive analysis permits a greater dedication of technical resources and allows a cumulative analysis of how potential development can impact overall flooding levels. A comprehensive plan reduces the likelihood that individual decisions will be capricious and impose burdens unfairly.

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment of the Court below.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

This brief *amicus curiae* of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is filed with the consent of the parties and in support of the respondents, as provided for in the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

The AFL-CIO is a federation of 86 national and international unions with a total membership of approximately 14,000,000 working men and women. The AFL-CIO, its affiliates, and their members have a strong interest in the constitutional standards applicable to local, state, and federal government economic regulation. As a result of this interest, the AFL-CIO has filed briefs *amicus curiae* in a number of this Court's recent cases involving the

proper interpretation of the Takings Clause. *See, e.g., Concrete Pipe & Prods. v. Constr. Laborers Pension Trust,* 113 S. Ct. 2264 (1993); *Yee v. City of Escondido,* 112 S. Ct. 1522 (1992); *Pennell v. City of San Jose,* 485 U.S. 1 (1988).

INTRODUCTION AND SUMMARY OF ARGUMENT

The AFL-CIO generally supports the positions stated in the brief for respondent in this case. Rather than restate the arguments presented in that brief, we submit this brief to address one argument raised by petitioner and numerous of her supporting *amici*. That argument is as follows: Under this Court's decision in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), a government effectuates a taking that must be compensated whenever it conditions the grant of a permit to develop property on the property owner's agreement to dedicate any traditional property interest to public use, unless the government can show that the conditions placed on the property owner do no more than remedy the precise quantum of harms that would be caused by the proposed development. *See, e.g.,* Brief for Petitioner at 22; Brief for the Institute of Justice at 3-4, 6; Brief of the National Association of Realtors, *et al.* at 4, 10-12; Brief of the National Association of Home Builders, *et al.*, at 16-17.

It is our submission in this brief that this argument is based upon an incorrect understanding of this Court's decision in *Nollan*. Our legal analysis begins with an examination of *Nollan*'s rule and the rationale for that rule. *See infra* pp. 6-8. We next show that in this case, unlike *Nollan* itself, application of that rule leads to the conclusion that the conditions here are a legitimate exercise of the police power and not a subterfuge for the uncompenstated taking of property. *See infra* pp. 8-22.

In making this showing, we examine and refute the contention of petitioner and her *amici* that, under *Nollan,* a state must demonstrate that any condition on a development permit that calls for an agreement to dedicate a traditional property interest must be carefully tailored to ensure that the condition does not result in remedying social harms beyond the specific quantum of harms associated with the proposed development.

First, we show that this contention is not supported in the *Nollan* decision. Rather, *Nollan* turns simply on whether a development condition involving a concession of property rights could be justified as an effort to remedy the social harms associated with the development in question. *See infra* pp. 10-13.

Second, we demonstrate that the test proposed by petitioner and her *amici* is in conflict with the logic and rationale of *Nollan*. *Nollan* recognized that it would be "strange" to force the government to deny a development permit outright, when the government could pursue the same legitimate public interests by the alternative means of granting the permit subject to conditions—including conditions that require the property owner to convey a property interest. Yet the practical implications of petitioner's proffered test would force precisely that "strange" result. *See infra* pp. 13-16.

Third, the position of petitioner and her *amici* is in conflict with basic premises of our system of government. That position cannot be reconciled with the well-established validity of premising government actions on reasonable presumptions and general rules, and the equally well-established validity of placing on individuals seeking exceptions to such rules the burden of showing the propriety of such exceptions. *See infra* pp. 16-19.

Finally, we demonstrate that under the *Nollan* test, properly understood, the conditions at issue in this case are clearly valid. The petitioner has not even approximated the showing required to impugne the legitimacy of those conditions. *See infra* pp. 20-22.

ARGUMENT

A. The facts that frame the issue in this case can be briefly summarized.

Engineering and other expert studies commissioned by the City of Tigard, Oregon showed that intensified commercial development of properties abutting Fanno Creek would increase stormwater runoff into the Creek and thereby heighten the risk that the Creek would flood. *See* Master Drainage Plan at, *e.g.*, 4-2 to 4-6, 5-1 to 5-8, 5-13 to 5-14. Informed by these studies, the Tigard City Council adopted Community Development Code provisions that condition approval of any additional "major" commercial development of those properties on the property owners' dedication of land within the 100-year floodplain of the Creek for a greenway to be used by the City for flood control purposes.

Expert studies also documented traffic congestion problems in the City's commercial district (where the petitioner's property and other Fanno Creek properties are located) that would be exacerbated by further commercial development. *See* Comprehensive Plan at, *e.g.*, Vol. I, p. 227-28, 236-48; Respondent's Appendix at, *e.g.*, 7, 31, 34. The City Council, acting on the basis of these studies and other materials, also adopted Community Development Code provisions that condition approval of any additional "major" commercial development of properties abutting Fanno Creek on the property owners' dedication of land suitable for the construction of a bicycle path that would serve to relieve some traffic congestion.

Pursuant to these Code provisions, when the Dolans sought a development permit to nearly double the size of their existing commercial establishment and to replace an existing gravel parking lot with a paved parking lot, the City conditioned the grant of the permit on the Dolans' agreement to dedicate the land required for the greenway and bicycle path.

The City's Community Development Code also provides that property owners may obtain, from the City Planning Commission, variances from conditions on development permits upon a showing, *inter alia*, that the development will not jeopardize the purposes underlying the conditions. *See* Code § 18.134.050. Although the Dolans sought relief from the greenway and bicycle path conditions through this variance process, the Dolans made *no* showing whatsoever in that process that the proposed development would not produce the additional stormwater runoff or would not generate the additional traffic congestion that were the predicates for the conditions placed on their development permit. *See* Appendix to Petition for Certiorari ("Pet. App.") G at 28, 37, 41.

In this procedural posture, the Planning Commission found, based on the nature of the proposed development and the results of the City's earlier studies, that the development "would be expected to increase the amount of storm water runoff from the site to Fanno Creek . . . [thereby] add[ing] to the need to manage the stream channel and floodplain for drainage purposes," *id.* at 37, and "to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets," *id.* at 24. And the Commission found that the greenway and the bicycle path would serve to alleviate the flooding and traffic harms that were expected to result from the proposed development. *Id.* at 24, 37. On those grounds, the Commission denied the Dolans' application for a variance.[1]

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[1] An additional ground for the denial of the variance was the Commission's conclusion that the Dolans would not be unduly burdened by imposition of the permit conditions. On this point, the Commission found that the Dolans would not be harmed by the dedication of land *within* the floodplain for a greenway because that land was virtually unusable due to year-round water flow from Fanno Creek and because the Dolans' building plans did not contemplate any use of that land. Pet. App. G at 39-41. The Commission further found that while the Dolans would have to

These findings of fact—made by the City Planning Commission, adopted by the City Council, upheld by the Oregon Land Use Board of Appeals, and affirmed by the Oregon Court of Appeals and the Oregon Supreme Court—are *not* contested by petitioner. Based on these factual findings, all of the bodies just referenced concluded that the permit conditions imposed on petitioner were directly responsive to the City's interest in flood control and traffic control, and that the variance was properly denied.[2]

B. The issue thus presented in this case is parallel to the issue presented in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987)—*viz.,* under what circumstances does a government's refusal to grant a development permit except on the condition that the property owner dedicate a property interest for public use amount to a taking of private property requiring the payment of just compensation?

1. In *Nollan,* the owners of a parcel of beachfront property sought a permit to build a larger dwelling on their property. The California Coastal Commission granted the permit but only on the condition that the property owners convey to the public an easement across the beach portion of their property. The *Nollan* Court noted at the outset of its analysis that:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase

modify their building plans to accommodate the dedication of land *adjacent to* the floodplain for a bicycle path, the Dolans had failed to show why such a modification could not be accomplished without hardship. *Id.* at 26-28.

[2] Although petitioner asserts in this Court that the City's permit conditions impose burdens on her that are not comparable to burdens imposed on "other similar development in the city," Brief for Petitioner ("Pet. Br.") at 23-24, the record contains no evidence on this point, and the petitioner has presented no Equal Protection Clause challenge to the City's action.

> public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a [physical] taking. [483 U.S. at 831.]

The *Nollan* Court thus defined the issue posed by the case as follows:

> Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome. [*Id.* at 834.]

The *Nollan* Court followed a two-step analysis for answering this question. The first step is to determine whether the government entity in question could lawfully deny the requested permit outright. If the government has the lawful power to deny the permit, the *Nollan* Court reasoned that the power

> must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end [that would justify denial of the permit]. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not. [*Id.* at 836-37.]

Conversely, "[t]he evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. In that event,

> the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. [*Id.*]

Thus, if the answer at the first step is that the government has the power to deny the permit outright, the second step is to determine whether the condition placed on the permit serves the same governmental interest as would have justified denying the permit altogether. The answer to the second question determines whether the condition is a proper exercise of the police power or a taking.

In *Nollan*, the Court assumed without deciding that the Coastal Commission could have denied the requested permit in order to "protect[] the public's ability to see the beach." *Id.* at 835. But the Court found at step two that: "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id.* at 838. Accordingly, the Court concluded that, because there was *no* nexus between the reason that would have justified denying the permit and the condition that the Nollans convey an easement across the beach area on their property, the easement could not be justified as an alternative means to address the problem raised by the Nollans' proposed development and therefore had to be analyzed on its own terms. So analyzed, the California Coastal Commission's requirement that the Nollans convey an easement across the beach to the public was a physical taking that must be compensated.

2. As we now show, application of the *Nollan* two-step analysis leads to the opposite result in the instant case.

a. Under the *Nollan* analysis, the first question here is whether the City could simply have denied the Dolans' request for a permit to nearly double the size of their commercial enterprise and to enlarge and pave their gravel parking lot. The City has asserted two concerns that, we submit, constitute precisely the kind of legitimate regulatory concerns that would justify such an action. The City

has stated—and it is undisputed in the factual record of this case—that intensified commercial development by property owners abutting Fanno Creek would increase the risk of flooding and would exacerbate existing traffic congestion problems in the area of these properties.

Certainly it would be a classic legitimate exercise of the police power for a local government to freeze further commercial development in an area where the government determined that such development could lead to increased risks of flooding or traffic congestion. As this Court stated in *Nollan*, "[w]e have long recognized that land-use regulation does not effect a taking if it 'substantially advanced[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" 483 U.S. at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

Here, as in *Nollan*, there could be no serious claim that a permit denial would have deprived the Dolans of the " 'economically viable use of [their] land.' " *Id.* And here—parallel to what was assumed in *Nollan*—a legislative determination to halt further major development in a particular area in order to avoid flood control and traffic congestion problems is well within what *Nollan* described as the "broad range of governmental purposes and regulations [that] satisfies" the " 'legitimate state interests' " requirement. 483 U.S. at 834-35; *see Agins*, 447 U.S. at 261 & n.8 (upholding local government policy of restricting residential development by setting an extremely low permissible density level in order to avoid such "ill effects of urbanization," as "air, noise and water pollution, traffic congestion, . . . fire and flood, and other demonstrated consequences of urban sprawl") (internal quotations omitted). *See also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) (collecting cases).[3]

[3] Although *Agins* treated the requirement that a development restriction "substantially advance legitimate state interests" as

b. As we have discussed, the second step in the *Nollan* analysis is to determine whether the conditions the City placed on the granting of the Dolans' permit serve the "same legitimate police-power purpose" as would have justified outright denial of the permit request.

(i) The *Nollan* Court states and explains the applicable test in this regard at several points in its opinion. It is useful to begin with an examination of the words used by the Court, because those words reveal both the nature and the logic of the test.

In laying out the test, the *Nollan* Court begins by "agree[ing]" with the argument "that a permit condition that serves the *same* legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." 483 U.S. at 836 (emphasis added). And, in concluding its explication of the test, the Court states: "In short, unless the permit condition serves the *same* governmental purpose as the development ban, the building restriction is not a valid regulation of land use

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part of the proper inquiry under the Takings Clause, the test originates in—and is carried over from—this Court's Due Process Clause jurisprudence. *Agins* invokes *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), in this regard. *See* 447 U.S. at 260. And *Nectow* was a due process case, *not* a takings case.

The majority and the dissent in *Nollan* debate the point whether this test for assessing the legitimacy of state regulation under the police power might be applied in the takings context in a more demanding manner than has been the case in the due process context. *Compare* 483 U.S. at 834 n.3 *with id.* at 843 & n.1. As we demonstrate in text, the result in this case does not turn on the proper resolution of that debate. Nevertheless, it is instructive to note that this Court has recently recognized that where "due process arguments are unavailing, 'it would be surprising indeed to discover the challenged [government action] nonetheless violating the Takings Clause.'" *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 113 S. Ct. 2264, 2289 (1993) (quoting *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986)).

but 'an out-and-out plan of extortion.'" *Id.* at 837 (emphasis added).

The key word in those formulations is "same"—*viz.*, the "*same* legitimate police-power purpose" or the "*same* governmental purpose." What is meant by that word is made clear by the passages in the opinion that disclose the logic of the test. Perhaps the fullest statement of that logic is contained in the following passage:

> [The] Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not. [483 U.S. at 836-37.]

Thus, *Nollan*'s premise is that the Takings Clause does not place the government, and the property owner, in a constitutional straight jacket by requiring the government to make an all or nothing choice—either to grant or to deny the permit. Rather, where alternative options, including "a concession of property rights" on the part of the property owner, might better serve the interests of both parties, the Takings Clause does not stand in the way. Where the government's legitimate interest could be served by the less drastic means of granting the permit on the condition of a concession of property rights that serves that same legitimate government interest, "it would be strange to conclude that providing the owner an alternative" to outright denial of the permit is a taking whereas the denial would be a legitimate exercise of the police power.

The *Nollan* Court provided the following hypothetical examples to illustrate this point:

> Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. [*Id.* at 836.]

As these examples show, as long as there is a nexus between the justification for denying a permit and the purpose served by conditioning a permit on the transfer of a property interest—*viz.*, as long as the condition can reasonably be characterized as an effort to serve the same purposes as a legitimate denial—the condition is a legitimate exercise of the police power and not a taking. And the Court's opinion makes clear what is inherent in the logic of the situation—the nexus test does not require that the condition serve the same purpose in the same degree or manner as an outright denial of the development permit. For example, in *Nollan*, providing a "viewing spot on their property" would have served the same interest of preserving sight lines to the shore as outright denial of the permit, but would not have done so in the same degree or in the same manner.

Accordingly, *Nollan* goes no further than to hold that: "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition *utterly fails to further* the end advanced as the justification for the prohibition." *Id.* at 837 (emphasis added). Thus, under *Nollan*, only when the condition "utterly fails to further" the same end is it appropriate to conclude that "[t]he purpose [of the condition] then becomes, quite simply,

the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." *Id.*

(ii) The logic and rationale of this test leave no room for interjecting a proportionality assessment of the type proposed by petitioner and her *amici*. First of all, the *Nollan* test, as we have shown, is predicated on the permissibility of an outright denial of the permit. And the validity of such a denial is *not* tested through any proportionality assessment. Nothing in *Nollan*'s logic provides a basis for injecting petitioner's proportionality analysis into the second stage of the *Nollan* analysis.

Equally to the point, the purpose of the test—to avoid forcing the government to an all or nothing choice, when other alternatives may satisfy the interests of both the government and the property owner—would be frustrated if the condition were subjected to different requirements than would be applicable to the question of outright permit denial. So long as the question asked is whether the condition serves the "*same*" purpose as would justify permit denial, the test is congruent with its rationale. If the condition is lawful only if it meets a more demanding standard not applicable in judging the validity of the permit denial, the test goes beyond its purpose.

Petitioner and her *amici* seek a Takings Clause rule that moves the *Nollan* approach far beyond whether the condition is an effort to address the "same" legitimate state interests as would justify permit denial. They would add the requirement that a condition is lawful if, and only if, the government body can carry the burden, through whatever expert studies or analyses may be necessary, of quantifying precisely the harms that the proposed development will cause, and of demonstrating that the conditions will alleviate no more than that quantum of the same harms.

Such a "proportionality" test would impose costs on any choice by a government entity to regulate land use

through conditions on development, no matter how legitimate the purposes pursued by the government entity. Such costs would include, at least, the following: (a) the transaction costs associated with conducting studies and evaluations of each particular property development, focused on determining the precise quantum of costs the particular development is likely to impose on the community and the quantum of benefits any particular condition is likely to provide; (b) the costs associated with proceeding in the face of uncertainty, without the ability to adopt a "cushion" of protection to account for the possibility of a project's imposing greater burdens on the community than anticipated; (c) the costs associated with having to design special conditions addressed to the burdens imposed by each particular project separately, even though it may be far simpler and less costly to formulate conditions that operate in coordination with an overall plan; and (d) the costs associated with the risk that, under petitioner's standard, any particular condition will be judged insufficiently tailored, so that compensation will be required.

Imposing these costs on governments considering development permit conditions would inevitably push government bodies to one of two unsatisfactory extremes: denying the permit outright or granting the permit outright. In the first instance, denial of the permit would protect the social interests that would be harmed by the development (and would avoid the costs that petitioner's test would otherwise impose). Doing so would, however, frustrate development and its benefits, and eliminate the possibility that the government and the property owner would find a mutually agreeable method of permitting development in a manner that alleviates the associated social harms. In the second instance, the granting of the permit would require the government to accept the public harms caused by the development.

That petitioner's test will often, in practice, prevent a government entity from proceeding through the use of de-

velopment conditions is demonstrated by this case. For example, petitioner and her *amici* assert that the City here should have been required precisely to determine how much added traffic congestion would, over time, be produced by the new development (a difficult or impossible task, given the uncertainties associated with predicting the long-term success of any commercial development, not to mention a development that, once completed, can be changed in use, *e.g.*, by petitioner changing the nature of her business or product). Then, the City should have precisely determined how much congestion the bicycle path would relieve over time, to ensure that it would not relieve more congestion than this particular development would cause. And the City should have to engage in a similar process for each permit application, at substantial cumulative costs.

It is particularly revealing that petitioner and her *amici* —after complaining of the inexactitude of the bicycle path condition as a remedy for the particular congestion that *this* proposed development may cause—at no point offer any suggestion as to what sort of condition might solve the City's legitimate concerns without constituting a taking. This is so, we submit, because the approach they advocate would make the formulation and provision of conditions by governments to solve these sorts of development problems, without the governments' actions being held to be takings, a practical impossibility.

But *Nollan* recognizes that the Takings Clause does not force a Hobson's choice. *Nollan* clearly recognized the value of governments being able to offer property owners legitimate alternatives to outright prohibition of development. For at least the last century, local government bodies throughout the country have used development conditions involving the transfer of real property interests as a principal means for assuring that development occurs in an orderly fashion, consistent with the health, safety and welfare interests of the broader community. *See, e.g.,*

D. Hagman & D. Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* 349-50 (American Society of Planning Officials 1978) ("Cities and counties routinely require subdividers to provide specific public facilities (e.g., water lines, sanitary sewers, paving of streets, construction of sidewalks, curbs, gutters, and drainage facilities) and to dedicate necessary streets and easements."); *see also* Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 Law & Contemp. Prob. 5-7 (1987); Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 Law & Contemp. Prob. 70 (1987); A. Nelson, *Public Provision of Pedestrian and Bicycle Access Ways: Public Policy Rationale and the Nature of Private Benefits* (Center for Planning and Development, Georgia Institute of Technology, Working Paper Series, Jan. 1994). Nothing in *Nollan*'s holding or rationale suggests that this deeply rooted beneficial practice is anything but a proper exercise of the police power.

(iii) Beyond its inconsistency with the rationale of *Nollan*, this "proportionality" argument put forward by petitioner and her *amici* is inconsistent with the basic premises of our system of governance. Here the City, after diligent legislative inquiry, adopted—for reasons we have shown to be legitimate state interests—a system of regulating property development in an area that included the Dolans' property. In enacting that regulation, the City did not undertake a separate inquiry into the effects of development on each parcel of property covered by the regulatory system, but rather relied on its general findings to state a general prohibition and a general exception—in terms of specified conditions—to the prohibition. And there can be no doubt that the general prohibition rests on preventing real social harms, and that the general exception is addressed to alleviating those same harms.

In regulating through general rules, the City was acting in the manner in which we expect legislative bodies to act. It is a basic tenet of our system that legislative bodies may—and ordinarily do—adopt rules of general application without making specific findings as to the impact that the regulations will have on each individual affected by the rules. *See, e.g., Gorieb v. Fox*, 274 U.S. 603, 607 (1927); *see also Penn Central, supra; Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Welch v. Swasey*, 214 U.S. 91 (1909).

And, this Court's cases have accepted this reality of our governance system, which is rooted in our inherent human limitations, in its myriad rulings that government bodies cannot be expected to act with anything like "scientific precision" or "mathematical exactitude." *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 n.16 (1987) ("That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it."); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude."); *Sproles v. Binford*, 286 U.S. 374, 388-89 (1932) ("To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government. . . . When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment."); *Gorieb, supra*, 274 U.S. at 608 ("State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which [local] conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable."); *Hadacheck v. Sebastian*, 239

U.S. 394, 413-14 (1915) ("[W]e have no means of determining, and besides, we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions, or that some other exercise would have been better or less harsh.").

Beyond adopting a general regulation, the City provided a variance process to consider individual circumstances. And it is equally well settled that governments may, as here, accommodate individual circumstances within a system of general regulations, by making available a procedure in which individuals may show that they should be exempted in whole or in part from a general regulation. *See Gorieb, supra,* 274 U.S. at 607. This Court has made clear that—in the context of regulation of the use of real property, as in other contexts—it is appropriate for government to place the burden of production and persuasion on the individual seeking an exemption or variance.

Indeed, this Court in *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962), placed this very burden on a property owner challenging a land-use restriction on due process grounds. *Goldblatt* involved an ordinance, enacted as a safety measure, regulating dredging and pit excavation on properties within the town. The property owner argued that further excavation of his property would not affect public safety. The Court stated:

> Although one could imagine that preventing further deepening of a pond already 25 feet deep would have a *de minimis* effect on public safety, we cannot say that such a conclusion is compelled by facts of which we can take notice. Even if we could draw such a conclusion, we would be unable to say the ordinance is unreasonable; for all we know, the ordinance may have a *de minimis* effect on appellants. Our past cases leave no doubt that appellants had the burden on "reasonableness." *E.g., Bibb v. Navajo Freight Lines,* 359 U.S. 520, 529 (1959) (exercise of police power is presumed to be constitutionally valid); *Salsburg v. Maryland,* 346 U.S. 545, 553 (1954) (the presumption of reasonableness is with the State); *United States v. Carolene Products Co.,* 304 U.S. 144, 154 (1938) (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it.) This burden not having been met, the prohibition of excavation on the 20-acre-lake tract must stand as a valid police regulation. [369 U.S. at 595-96.]

Here, the Dolans invoked the City's variance procedure, but chose to submit no evidence whatsoever on any of the issues they now claim to be determinative. They provided no evidence that their proposed development would not have the harmful effects that were the predicates of the regulatory program adopted by the City. Nor did they show that the conditions placed on the permit were not reasonable means to deal with the harms that the Dolans' proposed development was expected to create. The spectre of "disproportion" that they now raise derives not from evidence but from hypothesis. Thus, for example, petitioner conjectures, without any proof, that the storm-water runoff caused by the proposed development might be no more than a "thimble full" of water. *See* Pet. Br. at 28, 33; *see also e.g.,* Brief of the Institute for Justice at 24-25; Brief of Pacific Legal Foundation, *et al.,* at 16. But, without having submitted any evidence on the subject, petitioner is in no better position to attack the application of the City's regulatory scheme to her property than was the property owner in *Goldblatt.*[4]

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[4] Moreover, petitioner and her *amici* wholly ignore the benefits that will flow peculiarly to petitioner from the bicycle path and the greenway conditions. A completed bicycle path that provides another means of access to the commercial enterprises abutting Fanno Creek will be of obvious commercial value to those enterprises. Indeed, as the City Planning Commission specifically found in this case, "[i]t is reasonable to assume that customers and employees of the future uses of [the Dolans'] site could utilize a pedestrain/bicycle pathway adjacent to this development for their

(iv) On the understanding of the *Nollan* test that we have set forth, there can be no doubt that the conditions here serve the "same" legitimate governmental interests as would have justified a denial of the permit outright. The administrative factual findings here, which are undisputed, demonstrate that the conditions would serve to eliminate or alleviate the two harms that were reasonably found by the City to be associated with the proposed development—an increased risk of flooding and exacerbation of the existing traffic congestion problem. As we have made clear, precisely because those harms would result from the proposed development, it would have been a proper exercise of the police power for the City simply to deny the requested permit in order to avoid those harms. Thus, the conditions are addressed to the same harms as would have justified the denial. Under the terms of *Nollan*, the grant of the permit based on the conditions at issue here is therefore a proper exercise of the police power and not a taking.

In stating this conclusion in these straightforward terms, we are not unaware that *Nollan* expressed a concern that the governmental approach of conditioning a permit grant on the conveyance of a property interest not be used as a subterfuge for taking property without just compensation. The facts of *Nollan* itself show that this concern is not fanciful. And, as we understand it, the very purpose of the *Nollan* test is to separate out those development conditions that are legitimate exercises of the police power and those that are subterfuges for uncompensated takings of property interests.

In this regard, *Nollan* states that an inference of subterfuge is appropriate where the purpose served by the condition is not a purpose that would have justified denial of the permit. The inquiry required for that determination

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transportation and recreational needs." Pet. App. G at 24. Similarly, Creek-side property owners will obviously benefit more than other property owners from the increased flood protection provided by the greenway.

can be conducted on the face of the stated rationale for the government's action. There is no need in that inquiry for courts to second guess the precise balance struck by the government body in its pursuit of its fully legitimate regulatory goals.

At the same time, *Nollan* emphasized the legitimacy of bona fide development conditions. *Nollan* pointed out that it would be "strange to conclude" that governments could not employ the approach of conditional development grants as an alternative to prohibiting development. 483 U.S. at 836. And, as we have discussed, local governments have employed this approach as a principal means of managing development for the better part of this century. *See supra* pp. 15-16. Transactions of this nature are not thus inherently suspect, and there is no reason to look at this class of cases with less than the usual deference accorded by courts to legislative determinations. *See supra* pp. 16-19; *see also e.g. Nebbia v. New York*, 291 U.S. 502, 537-38 (1934); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1926); *Price v. Illinois*, 238 U.S .446, 452-53 (1914); *Powell v. Pennsylvania*, 127 U.S. 678, 683-86 (1887).

Against that background, even if, contrary to what we have shown (*supra* p. 19), petitioner had established a factual basis for the argument that the permit conditions imposed upon her would cause her to bear some burden for alleviating public problems that are caused not by her development but by the actions of others, that argument would not necessarily support an inference of subterfuge. As we have already shown at length, governments in adopting legitimate regulations are not expected or required to, and ordinarily do not, regulate with the kind of precision that assures the close fit between harm and burden for which petitioner and her *amici* argue. And the failure to achieve such a close fit is not normally seen as a basis for questioning the bona fides of the stated purposes underlying the regulation. Moreover, as we have also shown, there are numerous reasons why a government,

solely concerned with remedying the harms associated with a proposed development project, would likely adopt conditions that would fail the test advocated by petitioner and her *amici*. *See supra* pp. 13-15.

For these reasons, a property owner seeking to prove subterfuge must show far more than the mere fact that a development condition would likely operate to remedy more of a given social harm than her proposed development would likely cause. Rather, in order to raise an inference of subterfuge, the property owner would have to show that the development condition is so out of proportion to the legitimate public interests burdened by the proposed development that the condition cannot reasonably be justified as part of an effort to protect those interests.

Given that the petitioner has not even shown, as a fact, that the conditions here would likely remedy more harms than the development project would likely cause, it is plain without more that her Takings Clause challenge to the conditions fails.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Oregon in this case should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-518

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Writ of Certiorari to The Supreme Court of Oregon

BRIEF OF NATIONAL AUDUBON SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

National Audubon Society is a national conservation organization with approximately 550,000 members across the country. The Society is interested in the preservation of a balanced understanding of property rights, which recognizes not only that certain regulations can effect a taking but also that our elected representatives have broad constitutional authority to adopt reasonable regulations to protect and enhance private and public resources.

STATEMENT OF THE CASE

Amicus curiae National Audubon Society adopts respondent City of Tigard's statement of the case.

SUMMARY OF ARGUMENT

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), held that a dedication condition must be "reasonably related" to the public need or burden resulting from development. Petitioner and some *amici* contend that *Nollan* established much more. That contention is based on a misreading of *Nollan* which the Court should decline to accept in this case. The dedication conditions at issue is this case are entirely consistent with the holding of *Nollan*.

Nollan does not hold that a dedication condition can be upheld under the takings clause only if (1) public authorities could have prohibited the development without compensation, and (2) the dedication condition serves the same purpose as would prohibition. *Nollan* establishes that satisfaction of these two requirements constitutes a defense to a takings challenge to a dedication condition.

Similarly, *Nollan* does not hold that a dedication condition must "substantially advance a legitimate state interest" to avoid a successful takings challenge. Because the decision turned on application of a "reasonable relationship" test, the language in *Nollan* supportive of this more exacting substantial relationship test is *dicta*. The Court has *never* relied on a "substantial relationship" standard, either in *Nollan* or in any prior case, to find that a regulatory action effected a taking. At bottom, this type of means-ends

analysis is based on the requirements of the due process clause, not the takings clause. Incorporation of substantive due process into the takings clause would subject local land use regulations to intrusive and uncertain federal court supervision in violation of fundamental constitutional traditions, frustrate the efforts of democratically-elected officials to cope with serious environmental and transportation problems, and condemn takings law to deepened confusion and increased litigation.

We respectfully suggest that the Court take the opportunity presented by this case to sort out confusion about the relationship between the due process and takings clauses in the context of regulation of land use. Once the *Nollan* decision is reexamined in light of the distinct analytic approaches and remedies appropriate to each clause, *Nollan* is best understood as a decision resting on the due process rather than the takings clause.

ARGUMENT

The issue in this case is whether a local government may approve a development project on the condition that the owner dedicate a fraction of her property to the public, where such a requirement mitigates public and private harms the development would otherwise cause and confers significant benefits on the owner. Petitioner and *amici* contend that under *Nollan* the dedication conditions at issue in this case are invalid. In fact, the dedication conditions in this case are entirely consistent with *Nollan*. Petitioner's and *amici*'s arguments to the contrary are based on a misreading of *Nollan*.

I. *Nollan* Establishes a Two-Part Defense to a Takings Challenge to a Dedication Condition.

In *Nollan*, the Court held that the condition at issue in that case was invalid because it was not "reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes." 483 U.S. at 838. The Court concluded that the condition requiring lateral public access along the beach did not meet this standard because the condition was completely unrelated to the California Coastal Commission's goal of preserving visual access to the beach. No one contends that the City of Tigard's dedication conditions lack a reasonable relationship to identifiable development harms. Accordingly, the holding of *Nollan* supports the City.

Petitioner and some *amici* contend that *Nollan* established a second, two-part test for determining whether a dedication condition effects a taking. They contend that a dedication condition effects a taking unless (1) the public could have prohibited the claimant from pursuing his development project, and (2) the condition serves the same purpose that would be served by prohibition. *See* Brief for Petitioner, at 22. *See also, e.g.,* Amicus Curiae Brief of Northwest Legal Foundation, at 5. In fact, *Nollan* establishes no such test. *Nollan* merely identifies a potential defense to a takings claim: if both requirements are met, a takings claim fails.

This reading of *Nollan* is supported by several aspects of the decision. First, the Court's discussion of this potential defense to a takings claim responded to the Coastal Commission's argument that "a permit condition that serves the same legitimate police-power

purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." 483 U.S. at 836. The Court agreed with that proposition. However, "[t]he evident constitutional propriety disappears," the Court continued, "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. Fairly read, this portion of the opinion only states that a takings challenge to a dedication condition can be defeated by demonstrating that both of these requirements are satisfied. That legal conclusion is a far cry from the proposition advanced by petitioner that failure to satisfy either requirement conclusively demonstrates that a taking has occurred. *Nollan*, of course, did not so hold.

Second, once it rejected the Commission's argument that its dedication condition satisfied this defense, the Court proceeded to examine whether the beach access condition was reasonably related to the public needs and burden created by the Nollans' development. All of section III of the *Nollan* opinion would have been unnecessary if, as petitioner contends, a dedication condition that failed to satisfy the two requirements were automatically a taking. The fact that the Court proceeded to an examination of the condition's actual relationship to the development confirms that the Court did not believe it was announcing a new, independent test for determining whether or not a dedication condition effects a taking.

Apart from the logic and language of *Nollan* itself, the Court should reject petitioner's proposed two-part test because it violates simple common sense and is

contrary to the Court's established reading of the takings clause.

Viewed only as a defense to a takings challenge, petitioner's formulation is unobjectionable. If the public could prohibit a property owner from using her property altogether without effecting a taking, it is indeed difficult to see how allowing some development to proceed, even on the condition that the owner dedicate some portion of her property to the public, could be considered a taking, at least when the condition and the prohibition serve the same end. The authority to impose some greater restriction on the use of property for a valid public reason necessarily implies the authority to impose some lesser restriction on the property to achieve the same end.[1]

On the other hand, adopting petitioner's proposed test would create a nonsensical standard for determining whether a dedication condition actually effects a taking. First, the proposed test focuses on the wrong issue. In asking whether public officials could have validly rejected the development, the test poses a hypothetical inquiry of no actual relevance to the case. A takings challenge to a dedication condition

[1] The Court hypothesized in *Nollan*, 483 U.S. at 837, that California could not defend charging a $100 fee for shouting "fire" in a crowded theater on the theory that the State has the greater power to prohibit shouting altogether. In that hypothetical, the State's power to prohibit the activity cannot justify imposition of the condition because the condition is unrelated to the purpose of the prohibition. On the other hand, though the example is obviously fanciful, there would be no constitutional problem if the State allowed people to shout "fire" on the condition that they promptly and at equal volume shout "just kidding"; in this hypothetical the condition serves the same purpose as the prohibition.

only arises when the community has allowed the development to go forward.

Second, petitioner's proposed test would require the public to defend every type of dedication condition by justifying the even greater interference of a complete prohibition against use of the property. Ironically, this mode of analysis would invite greater, unnecessary intrusions on private property interests than the government actually intends.

Finally, the proposed test would produce inequitable results in practice. It would be manifestly unfair, for example, if a few of those developers subject to the dedication requirement could exempt themselves, even though their development contributed as much or more as any other to the problem being addressed, simply because the government lacked the theoretical (but unexercised) authority to prohibit their particular development.[2]

There is no discernible rationale based on the Court's prior decisions interpreting the takings clause for petitioner's novel two-part test. Petitioner contends (Brief at 22) that her proposed test is "consistent" with the "basic premise" that the "right of use" is an "essential attribute" of property ownership

[2] The perversity of petitioner's proposed test is apparent when considered in light of the common requirement that the developer of a residential subdivision dedicate land for internal public streets. Petitioner apparently would permit such conditions only in the odd case case where the locality could prohibit subdivision of the site entirely. But state and federal courts routinely uphold such conditions on the sound bases that the conditions have a "rational nexus" to costs generated by the new development. *See generally* D. Hagman & J. Juergensmeyer, *Urban Planning and Land Development Control Law* 202-212 (1986).

and, therefore, public approval of a development proposal cannot be considered a "benefit. . . that would justify government demanding a *quid pro quo* for permit approval."

The short answer to this contention is that, while the Court has recognized that the Constitution protects "property rights," *see, e.g., United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 505 (1993), the Court has never recognized a general "right to use property." Unlike the First Amendment, for example, which explicitly recognizes "freedom of speech" and "the right of the people peaceably to assemble." the takings clause creates only a negative right not to be subjected to an uncompensated taking of one's property for public use. Property rights themselves are created and defined by State law, not by the Constitution. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). The Court has frequently upheld costly restrictions on land use because of its recognition that government must act to prevent harm to public health and safety and because land use regulation according to a comprehensive plan enhances the economic and social value of the community's land in the aggregate.[3]

Some commentators have defended petitioner's proposed reading of *Nollan* as an application of what they term the "doctrine of unconstitutional condi-

[3] In *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), involving a prohibition on land use that made the property "valueless," the Court did not conclude that the regulation necessarily effected a taking, recognizing that even so onerous a regulation could be defended if it were consistent with background principles of state nuisance or property law or necessary to guard against a "grave threat" to life or property.

tions."[4] This doctrine, which probably does not exist, ostensibly holds that the government may not grant a benefit on the condition that the beneficiary cede a constitutional right. However, the requirement of the petitioner's test that the condition serve the same purpose as prohibition cannot be reconciled with this doctrine. Moreover, because *Nollan* expressly acknowledges that certain regulatory decisions involving dedication conditions do not effect a taking, *Nollan* itself refutes the notion that the doctrine of unconstitutional conditions can be mechanically applied to determine whether a dedication condition effects a taking.

This doctrine is inapposite in takings cases because of the distinctive character of takings doctrine. As the Court stated in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987), the takings clause "is designed not to limit governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." Consistent with this understanding of the function of the takings clause, courts have frequently held that dedication conditions, viewed in the context of the larger regulatory decisions of which they are a part, are entirely consistent with the Fifth Amendment.

In many cases, dedication conditions, such as those for sidewalks, applied broadly to all or some portion of a community, create reciprocal benefits for the

[4] *See, e.g.*, Epstein *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 5, 60-64 (1988).

property owner. In this regard, dedication conditions are similar to regulatory restrictions, such as zoning laws, which have long been upheld against takings challenges on the ground that they confer compensating benefits to the owner. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 (1987) (referring to the "average reciprocity of advantage that has been recognized as a justification of various laws"). Dedication conditions also are similar to user fees, the constitutionality of which has generally been upheld so long as the fees represent a "fair approximation"of benefit to the user. *See United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989).

In other cases, a dedication condition, much like a use restriction, serves to control and or mitigate public and private harms that would otherwise result from the development and which the public has broad authority to control. *See Keystone*, 480 U.S. at 492 ("no individual has a right to use his property so as to create a nuisance or otherwise harm others"); *see also Lucas*, 112 S.Ct. at 2901 (a regulation that denies an owner all economic use can be justified based on, among other things, "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities"); *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) ("regulations requiring subdividers to observe lot-size and setback restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed use would otherwise be the cause of excessive congestion").[5]

[5] Examination of a dedication condition in the context of the entire regulatory decision of which it is a part comports with the principle that takings challenges must be considered in relation to the "parcel as a whole." *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In *Concrete Pipe & Products v. Construction Laborers Pension Fund*, 113 S. Ct. 2264, 2290 (1993), the Court rejected a claimant's effort to artificially segment the property, stating that "we rejected this analysis years ago" in *Penn Central*, where "we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question." Petitioner's proposed test, by focusing on the condition, and asking only whether the purpose served by the condition would have justified outright prohibition of the development, is inconsistent with the "parcel as a whole" rule.

In short, dedication conditions are a legitimate method of land use regulation. No novel constitutional doctrine bars their employment. We turn now to evaluation of dedication conditions under traditional constitutional principles.

II. A Violation of the Due Process Clause Does Not Automatically Demonstrate a Constitutional Taking Requiring the Payment of Just Compensation.

Petitioner also seeks to rely on *Nollan* for the proposition that the conditions imposed by the City of Tigard effect a taking if they fail to "substantially advance a legitimate state interest." *See* Brief of Petitioner, at 20. While *Nollan* does contain this phrase, the decision held only that the beach access condition failed a reasonable relationship test. Other takings decisions of the Court also recite this phrase, but they do not explore what, if any, additional ob-

ligations the phrase might impose on local governments.

The relationship between legislative means and ends is, at bottom, a due process issue, not a takings issue. The Court should resolve the confusion over the relationship between the due process and takings clauses exacerbated by *Nollan* and some of the Court's other opinions. The Court should explicitly recognize that means-ends analysis has no place in takings doctrine.

A. No Precedent Definitively Supports Including A Means-Ends Test in Takings Law, Much Less Heightened Scrutiny of Means and Ends.

Despite the statement in *Nollan* that it is "well-established," 483 U.S. at 834, no decision of the Court definitively supports the idea that a regulation effects a taking if it fails to "substantially advance" a legitimate state interest. The Court has never relied on this standard to hold that a regulation effected a taking. Moreover, the Court has never examined in any detail why a means-ends analysis might provide a meaningful test for identifying a taking requiring the payment of just compensation.[6]

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[6] Members of the Court have touched upon the relationship between the due process and takings clauses in considering whether a regulatory action can effect a taking at all or whether instead burdensome regulation only violates the due process clause. Justice Brennan, in a dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 646-47 (1981), raised the question "whether a government entity's exercise of its regulatory police power can ever effect a 'taking' within the meaning of the Just Compensation Clause." Justice Brennan answered his own question by stating that, at least when a regulation eliminates all economic use of property, it can effect a taking. In the process, Justice Brennan rejected Judge Breitel's view that onerous regulations raise only a due process issue, not a takings issue. *See Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 384-85 (N.Y.), *cert. denied*, 429 U.S. 990 (1976) (Breitel, C.J.) ("In all but exceptional cases,. . . [an onerous] regulation does not constitute a 'taking,' and is therefore not compensable, but amounts to a deprivation or frustration of property rights without due process of law and is therefore invalid."). Surprisingly, no subsequent opinion for the Court has squarely addressed the specific question raised by Justice Brennan, though it was clear by the mid 1980's that several Justices accepted Justice Brennan's view that regulation can effect a taking, at least when it eliminates all economic value. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 361-62 (1986) (White, J. dissenting). The Court's apparent working assumption that at least some land use regulations can be challenged as either a taking or a due process violation obviously does not mean that takings doctrine incorporates a due process type of analysis.

In support of this test, *Nollan* cites only *Agins v. City of Tiburon*, 447 U.S, 255, 260 (1980), with a "see also" to *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978). *Agins*, a brief, unanimous decision *upholding* a zoning ordinance does indeed state that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." 447 U.S. at 260. However, the only support the *Agins* Court cites for this proposition is *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), a constitutional challenge to a zoning regulation, but one based on the due process clause and not the takings clause. There is no indication in *Agins* that the Court recognized that *Nectow* did not support the proposition for which it was cited, much less any analysis explaining why it might be appropriate to incorporate due process thinking into takings doctrine.

The citation in *Nollan* to *Penn Central* is similarly problematic. The *Penn Central* Court again cited *Nectow* and also asserted that a means-ends inquiry under the takings clause is "implicit" in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). *Goldblatt*, however, involved a due process challenge to a land use regulation, as well as a takings claim. The Court addressed these claims separately, and discussed legislative means and ends solely in the context of the due process claim. As in *Agins*, the Court in *Penn Central* did not explain why a means-ends test should be incorporated into takings doctrine.[7]

Petitioner's reading of *Nollan* to suggest the takings clause includes not only some type of means-ends analysis, but requires even stricter scrutiny of means and ends than the due process clause itself, has *no* support in precedent. Certainly *Nollan* itself does not require this higher level of scrutiny, because the Court struck down the beach access condition relying on a reasonable relationship test. Moreover, just last year in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Fund*

[7] The *Penn Central* decision also contains a "cf." citation to Justice Stevens' concurring opinion in *Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1977), in which he describes the Court's early zoning decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), as having "fused the two express constitutional restrictions on any state interference with private property—that property shall not be taken without due process of law nor for a public purpose without just compensation—into a single standard." That description is debatable because *Euclid* only involved a challenge under the due process and equal protection clauses. In any event, in the intervening fifteen years, the Court has not embraced Justice Stevens' theory and the *First English* decision in 1987 reinforced the distinctions between takings and due process violations. *See* p.20, *infra*.

for Southern California, 113 S. Ct. 2264, 2289 (1993), a case involving both due process and takings challenges to a federal statute modifying employers' pension liabilities, a unanimous Court stated that, if a regulation satisfied the due process clause, "it would be surprising indeed to discover the challenged statute nonetheless violates the Takings Clause." *See also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986).

Footnote 3 of *Nollan* states that the Court's precedents "do not establish that these [means-ends] standards [as applied to just compensation claims] are the same as those applied to due process or equal protection claims." "To the contrary," the footnote continues, "our verbal formulations in the takings field have generally been quite different," citing *Agins v. Tiburon*, 447 U.S. 255, 260. It concludes with the statement that "there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges [and] due process challenges. . . are identical. . . ."

There are several serious flaws in this reasoning. Because there is no solid precedent for the idea that takings doctrine includes *any* means-ends test, it is hardly surprising that the Court's precedents "do not establish" that the means-ends test under the due process and takings clauses are the same. The statement that there "is no reason to believe" the standards are the same hardly provides a justification for believing the standards would be different. Furthermore, the decision in *Agins*, the lone precedent cited in footnote 3 of *Nollan*, actually contradicts rather than supports the notion that the takings clause re-

quires stricter scrutiny. *Agins* relies upon *Nectow*, which is itself a due process case. This chain of citation suggests that, to the extent the takings clause might incorporate means-ends analysis at all, the standards under the due process and the takings clause should be identical.[8]

It has been nearly sixty years since the Court abandoned reviewing the wisdom of economic regulations under substantive due process. *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). That important step rested on the realization that democratically elected officials have the constitutional authority to adjust the benefits and burdens of economic life even when such decisions cause losses to owners of business capital. The Court should not stumble into that thicket again via a different path by allowing the takings clause to expand to include a strict means-ends test for review of regulations effecting the use of commercial property. Petitioner's reading of *Nollan* points in that direction and should be rejected.

B. Strong Legal, Policy, and Doctrinal Reasons Militate Against Including Means-Ends Analysis in Takings Law.

In addition to the lack of precedent for the idea that the takings clause requires a means-ends analysis, important legal and policy considerations, and the Court's obligation to maintain coherent legal doctrine, argue strongly against including a means-ends test in takings law.

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[8] While *Nectow* sets forth a relatively rigorous means-ends test compared to the Court's modern formulations under the due process clause, that difference simply reflects the historical evolution in the Court's due process jurisprudence over the last 65 years.

Adoption of petitioner's proposed test would allow litigants to recast garden variety due process claims as takings claims, simply by describing as a taking a regulatory imposition that would traditionally be perceived as raising a due process issue. And litigants and their counsel would have a substantial incentive to do so, of course, because the takings clause provides monetary, not injunctive relief. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311-12 (1987). The tendency would be even stronger if the takings clause were read to include not merely a reasonable relationship test but a "substantial" relationship test. The transmutation of due process claims into takings claims would subject federal, state, and local governments to enormously expanded liability and precipitate a substantial increase in the volume of litigation. *See* Epstein, *Takings Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 44 (arguing that *First English* and *Nollan* "increase the rate of return from" litigation and "it will now pay" to challenge "many" decisions that previously did not give rise to litigation).

These substantial costs could, of course, be justified if protection of constitutional property rights required it. It does not.

At its core, the takings doctrine is concerned with government assertion of the power of eminent domain—the involuntary appropriation of land or other property for the construction of public facilities and for other broadly defined public purposes. Takings in this core sense involve a deliberate, unilateral government decision to purchase property in exchange

for just compensation. The drafters of the Bill of Rights apparently intended the takings clause to apply primarily if not exclusively to this form of deliberate government appropriation,[9] a fact acknowledged by the Court in *Lucas*, 112 S. Ct. at 2900 n.15 ("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all."). Nonetheless, the Court, beginning with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), has read the takings clause to extend to some regulatory actions.

Even with this step, however, the touchstone of the Court's takings decisions has centered on analogies to exercises of the power of eminent domain. As Justice Brennan stated, "police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *San Diego Gas & Electric*, 450 U.S. at 652. Similarly, in *Lucas*, the Court ruled that a regulation which deprives the owner of "all economically beneficial or productive use of land" is a presumptive taking because, among other things, a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." 112 S. Ct. at 2894. If the regulatory takings doctrine has any coherent focus, it must be on the burdensomeness of the regulation or condition on the property as whole, evaluated in light of the purposes it serves and the justified expectations of the owner.

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[9] *See* Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 *Yale L. J.* 694 (1985).

However, a means-ends inquiry would bring within the ambit of takings law a host of issues that are unrelated to the core concern of takings law. If, for example, the California Coastal Commission had granted the Nollans a development permit on the condition that the Nollans exclude mentally retarded children from their beach property, that legislative goal would clearly be illegitimate. *Compare City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). Similarly, if the Commission denied the Nollans a permit because their name began with "N," that regulation would be an irrational means of accomplishing the goal of beach access. Both of these restrictions plainly should be struck down as lacking a rational basis, whether under the due process or the equal protection clause. Just as plainly, however, they do not represent the kind of imposition on property ownership that constitutes a taking requiring the payment of just compensation.

A means-ends analysis also cannot be squared with the distinct character of traditional takings analysis. The Court's review of regulations under the takings clause assumes that the ends and methods the government has selected are valid, but asks whether the government must pay compensation as a result of its action. As the Court stated in *Mahon*, the takings analysis under the Fifth Amendment "presupposes that [property] is wanted for public use, but provides that it shall not be taken for such use without compensation." *See also First English*, 482 U.S. at 315 (the takings clause "is designed not to limit the governmental interference with property rights *per se* but rather to secure compensation in the event of otherwise proper interference amounting to a taking").

On the other hand, lack of a rational relation to a permissible purpose indicates not that the government must pay compensation, but rather that the government cannot take the action at all. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

These different analytic approaches under the due process and takings clauses are reflected in the different remedies under each clause. The traditional remedy for a violation of the due process clause is an injunction halting the unconstitutional government action. On the other hand, as the Court recently clarified in *First English*, "government action that works a taking of property rights necessarily implicates the constitutional obligation to pay compensation." 482 U.S. at 315. Thus, melding means-ends analysis into takings doctrine would also sow confusion as to the appropriate remedy in takings cases.

Properly understood, *Nollan* rests on due process grounds. The Court employed the analytic framework provided by the due process clause, not the takings clause. The Court concluded that the beach condition was an *invalid* means of achieving the Commission's purpose; the Court did not analyze the case, as would have been appropriate if the case had been decided under the takings clause, by asking whether the Commission must pay just compensation in order to impose a *valid* condition. Consistent with this understanding of *Nollan*, the Court struck down the condition; it did not direct the payment of just compensation, as would have been appropriate if the case had been decided under the takings clause.[10]

[10] While it is obviously unnecessary to resift the facts of *Nollan* in this case, one can certainly debate whether the Court properly applied its traditional due process standards in that case. *See Nollan*, 483 U.S. at 843 (Brennan, J., dissenting). In any event, if the claim in the present case were viewed as a due process claim, it would survive challenge under the standard articulated in *Nollan* because there is plainly a "reasonable relationship" between the impacts of the Dolan development and the conditions at issue.

The fact that the *Nollan* "reasonable relationship" standard is actually a due process test does not mean that petitioner cannot frame a coherent takings claim in this case. The basic analytic framework for evaluating that claim is provided by the three factors the Court has traditionally identified as having particular significance in the regulatory takings context: the character of the government action, its economic impact, and the owner's reasonable investment-backed expectations. Review of regulatory decisions involving dedication conditions differs from the Court's review of other regulatory actions in that the character of the government action should make the Court alert that a dedication condition may involve serious losses to the owner not adequately captured by any diminution in economic value. Dedication conditions attached to commercial real estate are obviously unlikely to impose such noneconomic losses on an owner. At the same time, the takings inquiry in this as in every other context remains fact-sensitive.[11] No hard and fast rule can properly distinguish between regulatory decisions that involve (sometimes trivial) dedication conditions and regulatory decisions imposing stringent use restrictions.

[11] Application of the *per se* test for physical occupations would plainly be inappropriate, as *Nollan* recognized, because the owner accepted the condition to pursue valuable development.

III. The City of Tigard's Regulatory Conditions Do Not Effect a Taking.

Applying the foregoing, the Court should conclude that the City of Tigard did not effect a taking. First, both flooding and traffic congestion concerns would have supported a decision to reject the Dolans' proposal to build a new store, for the reasons described by the City of Tigard in its brief. The floodplain and transportation corridor conditions serve the same objective as such a prohibition. Because satisfaction of these two requirements is sufficient to defeat a takings claim, the decision of the Supreme Court of Oregon should be upheld on this basis alone.

Second, even if this defense does not apply, the petitioner has failed to demonstrate a taking. Payment of compensation is not appropriate in light of the substantial reciprocal benefits the conditions confer on the Dolan property and the harm the planned development would otherwise impose on other private and public resources. While the character of the dedication counts against the City's decision, this factor has limited significance as applied to commercial property of the kind at issue in this case.[12] *Compare Lucas*, 112 S. Ct. at 2899 (commercial personal property entitled to no protection against use restrictions that eliminate all value). The other two relevant factors weigh heavily against a finding of a taking. The economic effect of this regulatory decision on petitioner is small. Because petitioner already is making a very substantial economic use of the property, and the conditions do not materially interfere with petitioner's plans for expansion of her business, the City's action does not impair any investment-backed expectations.

[12] In this regard, it is noteworthy that while one of petitioner's amici refers to the business at issue in this case as a "country store," it is actually one location in a medium-sized chain of plumbing supply stores across the Portland metropolitan area which, according to a recent Dun & Bradstreet report, employs about 140 employees and has annual sales of approximately $17,000,000.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Supreme Court of Oregon.

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FLORENCE DOLAN, *Petitioner,*

vs.

CITY OF TIGARD, *Respondent.*

On Writ of Certiorari To The
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BRIEF OF AMICUS CURIAE BROWARD COUNTY, FLORIDA, IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS CURIAE BROWARD COUNTY, FLORIDA, IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE

Broward County, Florida, a political subdivision of the state of Florida, is a local government charged with the responsibility of providing for the welfare of its citizens. This responsibility includes the requirement that Broward County make appropriate determinations as to what, if any, conditions should be imposed upon various uses of property located within its boundaries. This case is concerned with the standard to apply in making such determinations.

Because this brief is being submitted by the authorized law officer of a political subdivision of a state, consent for its filing by the parties is not necessary. Rules of the Supreme Court of the United States, Rule 37.5.

SUMMARY OF ARGUMENT

In order for a land use restriction to be valid it must substantially advance a substantial public purpose. The strength of the relationship between the condition imposed and the purpose it serves should not be viewed as an independent factor that must reach a certain level in order for the condition to be valid. Rather, as long as there exists a reasonable relationship between the condition and the purpose, the strength of the link should be viewed as a factor to consider in weighing governmental interests against private interests.

Under this approach, a more compelling connection might be required when the public purpose is substantial, but not of the highest order, or where the private interests are particularly strong. Conversely, a link of somewhat lesser strength might be sufficient when the governmental interest is of exceptional importance, when the interest is furthered in some unique or highly effective manner or when there is a minimal infringement of the private interests involved.

The fact that a public purpose must be substantial and that a condition must substantially further that purpose in no way means that the relationship between a condition and a purpose must itself also be "substantial." The contention that such a relationship should be required offers linguistic, but not logical, consistency. It calls for this Court to depart from its historic focus and to overemphasize one factor of the many that must be balanced in making appropriate decisions regarding land use.

The approach advocated by Broward County is consistent with the manner in which this Court has previously treated land use issues and allows for full consideration of the many variables inherent in determining such matters. It avoids locking governments and courts in the sort of rigid formula that this Court has consistently eschewed and provides a flexible approach that takes into account the needs, goals, concerns and realities of each particular locality.

ARGUMENT

WHEN A SUBSTANTIAL PUBLIC PURPOSE IS SUBSTANTIALLY FURTHERED BY A LAND USE RESTRICTION, THE EXISTENCE OF A REASONABLE RELATIONSHIP BETWEEN THE RESTRICTION AND THE PURPOSE CONSTITUTES A SUFFICIENT BASIS TO WEIGH THE GOVERNMENTAL AND PRIVATE INTERESTS, WITH THE STRENGTH OF THE RELATIONSHIP CONSTITUTING ONE FACTOR TO CONSIDER IN THE WEIGHING PROCESS.

Land use regulation effects a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). Thus, "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose." *Penn Central Transp. Co. v. New York City*, 430 U.S. 104, 127 (1978). The determination of when property has been taken "necessarily requires a weighing of private and public interests." *Agins*, 447 U.S. at 261.

As noted in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court has not "elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies that the former 'substantially advance' the latter." *Id.* at 834 (footnote omitted).

This Court in *Nollan* concluded that a permit condition that serves the same legitimate police-power purpose as a refusal to issue a permit is not a taking if the refusal to issue the permit would not have constituted one. This evident constitutional propriety disappears, however, if the condition substituted for the prohibition "utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. When that is the case, the "essential nexus is eliminated." *Id.* Despite setting forth these principles, this Court in *Nollan* did not address the question of "how close a 'fit' " between the condition and

the governmental interest is required, finding the conditions in the case to be invalid under even the most untailored standards. *Id.* at 838.

Broward County suggests that when it is shown that a substantial public purpose is substantially furthered by a condition, it is appropriate to weigh the public and private interests if the condition is reasonably related to the governmental interest. The weighing process would then take into account the question of how substantial the relationship is under the facts of each particular case. Such a flexible standard would be consistent with the manner in which this Court has historically examined questions of this nature. It would also constitute a far more workable and realistic standard than the "substantially related" test urged by Petitioner, given the panoply of variables that are inherent in issues of this nature.

As discussed above, the focal points of this Court's pre-*Nollan* cases were the nature of the interest asserted and the question of whether that interest was furthered by the condition in question. Thus, this Court established the requirement that the interest be "substantial" and the requirement that it be "substantially" advanced.

The existence of these two "substantiality" requirements in no way means, or even implies, that the relationship between conditions and governmental interests must also be "substantial." Any argument to that effect would seem to be premised more on linguistic consistency than on precedent.

This Court's analysis has consistently demonstrated that when the government demonstrates that the two "substantiality" concerns are met, there exists a basis to warrant the balancing of the governmental versus the private interests. *See, e.g., Agins* (scenic zoning); *Penn Central* (landmark preservation); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (residential zoning). The strength of the nexus between the conditions and purposes has thus not constituted a separate criterion to be met by the government. Rather, it is a factor to consider in the weighing process, a process that determines whether a regulation "goes too far" and thus becomes "recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). It is a facet of the "character of the governmental action," one of the

appropriate considerations in determining whether a restriction improperly forces a property owner to bear a public burden which, in all fairness and justice, should be borne by the public as a whole. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980).

Such an analysis allows for the application of an appropriately flexible approach. When a governmental interest is substantial, but not of the highest order, when the interest is substantially furthered, but not as directly or effectively as possible, or when the private interest is particularly significant, a stronger link might be needed to uphold a condition. On the other hand, when a governmental interest is of exceptional importance, when the interest is furthered in some unique or highly effective manner, or when the private interest is minimal, a condition could be upheld when a link is of a somewhat lesser nature.

Clearly, when a condition "utterly fails" to further the governmental purpose, as in the example given in *Nollan* of a tax contribution of $100 in order to shout fire in a crowded theater, 483 U.S. at 837, there is no basis to trigger a weighing analysis. Requiring the existence of a substantial relationship, however, could create many unjust results in cases in which minimal infringements on private interests can result in extraordinary public benefits. Adoption of the analysis urged by Broward County allows for full consideration of all facts and circumstances and the opportunity for a just result in all cases.

This approach is consistent with the general principles that have been established by this Court with regard to governmental regulation of land use. There is "no precise rule," *Agins*, 447 U.S. at 260, to determine questions of this nature, because there is "no 'set formula to determine where regulation ends and taking begins.'" *McDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986), quoting *Goldbatt v. Hempstead*, 369 U.S. 590, 594 (1962). Rather, such questions are treated as "turning upon the particular circumstances of each case," *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958), and resolution of each case "ultimately calls as much for the exercise of judgment as for the application of logic." *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

Perhaps the most basic concept that can be distilled from these authorities is that the Takings Clause of the Fifth Amendment "preserves governmental power to regulate, subject only to the dictates of ' " 'justice and fairness.' " ' *Id.*, quoting *Penn Central*, 438 at 124, and *Goldblatt*, 369 U.S. at 594. These dictates are not well served by treating the nexus between a restriction and the public interest as an independent hurdle that must be surmounted in the abstract, without consideration of the context in which a case arises. Rather, the promotion of justice and fairness requires that the strength of the nexus, assuming a reasonable relationship is shown, be assessed within the process of balancing the interests involved.

One of the restrictions involved in the present case, the requirement that a strip of land be dedicated for a pedestrian/bicycle pathway, provides a vehicle to demonstrate the variety of variables inherent in issues of the sort presented here and the resulting need for flexibility in considering the strength of the link between a public interest and a condition imposed by government.

A pathway that is part of a comprehensive transportation system, as in the present case, *Dolan v. City of Tigard*, 317 Or. 110, 116, 854 P.2d 437, 440 (1993), serves a more substantial public purpose than one that is for recreational use only. A pathway that serves as a key link between a residential area and a business district would likely be more significant than the most outlying arm of a transportation system. The importance of such a system in an area in which the weather allows it to be used by residents all year might be greater than that of a system in a location in which the pathways would annually be covered with snow and ice for months at a time.

Variables affect not just the strength of the public purpose, but also the impact on the property owner. One such variable would be the purpose for which the property is being used. If, for instance, the business involved in the present case was a fast food restaurant or a bicycle shop, rather than an electric and plumbing supply business, chances are that the pathway would have a positive effect on business. If, on the other hand, there was a private residence on the property, the resident's interest in privacy would be a highly significant factor to

take into account. Other variables might include the manner in which the portion of the property to be dedicated for the pathway could otherwise be used, the percent of the total area of the property that is encompassed by the dedication and the question of whether the pathway would cause problems for the business located there.

The impact of a proposed land use change also produces variables. Will the expansion of a business, as here, bring more customers to the area and thus increase the traffic flow? Will such an effect occur from an increased number of employees working at the expanded business? Will the number of deliveries to the business increase to provide inventory to fill the added space? How will any increased traffic impact on the safety of bicyclists and pedestrians that presently travel through the area despite the lack of a pathway?

The nature of the particular restriction would also be assessed in weighing the interests. Obviously, a requirement that property be actually conveyed would generally call for a stronger nexus than a less intrusive restriction. Further, the risk that such a requirement would be for the purpose of avoiding the payment of compensation would constitute a significant factor to consider, satisfying the concern expressed by this Court in *Nollan*. 483 U.S. at 841.

Only when the nexus question is viewed in the context of variables such as these can it be considered fairly and justly. The nexus when a pathway providing a vital link in a transportation system cuts across an unused back corner of property on which a hamburger stand is located should not have to be of the strength required when a pathway built for recreational purposes traverses the entire width of the front yard of a private residence. Thus, flexibility is a requisite for appropriate determinations by the courts. The sort of rigid standard advocated by Petitioner would force the nexus issue to be considered abstractly, without reference to the factors that are the key to its determination.

It should additionally be realized that only by the adoption of a flexible standard such as that advocated in this brief can governments make realistic decisions as to what restrictions are acceptable. Every community is unique and needs to be able to tailor its decisions to its

individual circumstances. Moreover, the ripple effects of land use decisions, effects which may not be immediate, but which may arise from an immediate effect, are matters best weighed by the local decision makers. Land use decisions must take into account the needs, goals and concerns of the particular locality. If governments are required to consider potential restrictions handcuffed by an antiseptic legal framework and divorced from the realities of their own circumstances, their determinations will carry the veneer of justice and fairness, but lack the soul of those concepts.

CONCLUSION

"The attempt to determine when regulation goes so far that it becomes, literally or figuratively, a 'taking' has been called the 'lawyer's equivalent of the physicist's hunt for the quark'." *Williamson Planning Commission v. Hamilton Bank*, 473 U. S. 172, 199, n. 17 (1985), citing C. Haar, Land-Use Planning 766 (3d ed 1976). This Court has consistently eschewed formula approaches to this search, *McDonald, Sommer & Frates; Agins; Penn Central; Goldblatt*, calling instead for an "exercise of judgment," *Andrus*, 444 U. S. at 65, governed only by the dictates of "justice and fairness." *Id.; Penn Central*, 438 U.S. at 124; *Goldblatt*, 369 U. S. at 594. In order to achieve these goals, courts and governments require the flexibility to include in the process of balancing the governmental and private interests the strength of the nexus between a land use restriction and its public purpose.

Justice and fairness are fragile concepts. When constructed in a vacuum, they can appear as substantial as a brick wall, but in the glare of reality they can turn out to be made of papier mâché. Requiring the nexus to be considered as an independent issue, rather than weighed along with all the variables that exist in a given case, is to take the chance that the wall of justice and fairness appearing from the sterile legal analysis may prove to be false. The weighing process, on the other hand, feels, prods, kicks, pokes and tests the wall. It determines what it is made of and substitutes brick when papier mâché is found.

In the present case, there clearly existed a reasonable relationship between conditions imposed and the substantial public purposes they served. The Oregon Supreme Court therefore properly rejected Petitioner's claim that a higher standard was required in order to weigh the governmental interests against the private interests. Its decision should be affirmed.

Respectfully submitted,

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Petitioner,

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CITY OF TIGARD, OREGON,

Respondent.

On Petition for Writ of Certiorari
to the Oregon Supreme Court

BRIEF OF *AMICI CURIAE* THOMAS H. AND ESTHER H. NELSON IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the City of Tigard's conditioning its approval of a land use permit upon the Dolans' surrender of property rights constitute an unconstitutional condition?

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BRIEF OF *AMICI CURIAE*
THOMAS H. AND ESTHER H. NELSON
IN SUPPORT OF PETITIONER

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Amici curiae[1] Thomas H. and Esther H. Nelson ("*Amici*") own real property in the City of Lake Oswego, Oregon. Lake Oswego abuts the municipal boundary of the Respondent City of Tigard on the east. Because *Amici* are now actively litigating claims against the City involving issues highly similar to those arising in the

[1] Letters from counsel for Petitioner and Respondent consenting to the filing of this brief by *amici curiae* have been filed with this Court.

Dolan v. City of Tigard situation, *Amici* sought and received permission to submit this *amicus curiae* brief.

Several years ago *Amici*, who sought to build a dwelling on a lot they had purchased earlier, became involved in land use disputes with the City of Lake Oswego. Two of *Amici*'s legal challenges to Lake Oswego's land use practices are now pending before the Oregon Court of Appeals. The first of those challenges is almost identical to that of Petitioner: Whether compensation must be paid in return for the surrender of possessory interests in real estate that were demanded as a condition of issuance of a land use permit.[2] In *Amici*'s case, the governmental permit was a "lot line adjustment," which is an administrative action that conformed Lake Oswego's municipal land ownership records to the records on file in the Clackamas County courthouse. The real property interest demanded and taken is a 55-foot-wide drainage easement that bisects *Amici*'s lot and the neighboring lot. The second pending challenge, which also arose as a condition in the lot line adjustment approval, is an attempted class action that would test the validity of "nonremonstrance agreements." Such agreements, upon which a variety of land use permits are routinely conditioned, prohibit the signatories and their successors in title from opposing the formation of local quasi-municipal "improvement districts."[3] The conditions appended to *Amici*'s lot line adjustment approval are reprinted herein as Appendix A. The requirement that a 55-foot-wide easement be granted the City of Lake Oswego is condition 6, and the requirement that a nonremonstrance agreement be submitted is condition 4. The text of the required nonremonstrance agreement is reprinted as Appendix B.

To date, *Amici* have been unsuccessful in their claim against the City of Lake Oswego based upon alleged inverse

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[2] That litigation, *Nelson v. City of Lake Oswego*, is pending in the Oregon Court of Appeals, Docket No. A78257.

[3] That litigation, *Nelson v. City of Lake Oswego*, is also pending before the Court of Appeals, Docket No. A76358.

condemnation, in large part because of the Oregon Supreme Court's decision in *Dolan*. Regardless of the rationale this Court employs, it is expected that this Court's decision will have a direct impact upon *Amici*'s claim for just compensation. In addition, should this Court employ the doctrine of unconstitutional conditions in the *Dolan* context, the Court's decision could also affect *Amici*'s claims arising from alleged violations of political and civil rights.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amici hereby adopt Petitioner's statement and description of the opinions below, jurisdiction, statutes involved and statement of the case.

SUMMARY OF THE ARGUMENT

In addition to reversing the decision of the Oregon Supreme Court on a "takings" basis, this Court should consider reversing and remanding the matter for trial on the broader, independent legal grounds that the City unconstitutionally required Petitioner to surrender a valuable legal right as a condition of its grant of a governmental permit.

ARGUMENT

Amici agree with Petitioner that the decision below should be invalidated because it is in conflict with this Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). *Amici* suggest that the Court also consider and address the practice the City of Tigard used to achieve the exaction, *viz.*, requiring Petitioner to surrender a valuable legal right in return for what is

acknowledged to be a governmental privilege. Because *Amici* presently have a similar inverse condemnation claim now before the Oregon Court of Appeals and because *Amici* have immediate experience regarding municipalities' widespread resort to conditioning a privilege upon the required surrender of important rights, they sought to participate in this case.

The government may not condition its grant of a privilege upon the surrender of a constitutional right. *See generally* Comment, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960). *Sherbert v. Verner*, 374 U.S. 398 (1963), applied the prohibition against conditioning privileges upon surrender of rights in a freedom of religion context. As this Court stated in *Sherbert*, individual rights may not be "infringed by the denial of or placing of conditions upon a benefit or privilege." Id. at 404. The dispute therein arose when a Seventh-Day Adventist was fired for refusing to work on Saturday, and South Carolina refused unemployment compensation because of the failure to accept suitable work. This Court invalidated the denial on the grounds the right to a discretionary benefit could not be conditioned upon surrender of basic freedoms. The Court said:

> In *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 [1958], we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to "produce a result which the State could not command directly."

374 U.S. at 405.

Gardner v. Broderick, 392 U.S. 273 (1968) ("*Gardner*"), extended the prohibition of *Sherbert* to rights beyond the First Amendment. In *Gardner*, a New York policeman was asked to testify to a grand jury regarding police bribery and corruption. He refused and was therefore fired. His request for reinstatement was denied, and the case ultimately found its way to the U.S. Supreme Court. That Court held that his firing was unconstitutional; in so doing, the Court reflected the rationale that is directly applicable to this appeal: The grant of a governmental privilege cannot be conditioned upon surrender of an independent legal right. There, the privilege was continued employment as a governmental employee. The independent right required to be surrendered was the Fifth Amendment's guarantee against self-incrimination.

Professor Tribe has succinctly summarized the doctrine of unconstitutional conditions:

> The notion that, whenever a privilege or benefit might be withheld altogether, it may be withheld on whatever conditions government chooses to impose, has been repeatedly repudiated since the mid-20th century. Independently unconstitutional conditions--those that make enjoyment of a benefit contingent on sacrifice of an independent constitutional right--are invalid; whether a condition is unconstitutional depends on whether government may properly demand sacrifice of the alleged right in the particular context.

Laurence H. Tribe, *American Constitutional Law* § 11-5, at 781 (2d ed. 1988) (footnote omitted).

The doctrine of unconstitutional conditions provides an independent basis for invalidating the actions of the City of

Tigard. *Amici* respectfully request this Court to consider and address the rationale of unconstitutional conditions in this case not only because it is a sound basis for analysis and decision, but also because municipalities in general, and Oregon municipalities in particular, routinely condition land use decisions upon the surrender of fundamental constitutional rights *other than* property rights. For example, many Oregon municipalities routinely require applicants for land use permits to surrender the most basic First Amendment freedoms. Using the doctrine of unconstitutional conditions in the *Dolan* context would undercut this widespread and pernicious practice.

Amici have had firsthand experience with municipalities' conditioning land use permits upon the surrender of First Amendment freedoms. In *Amici*'s situation, the City of Lake Oswego conditioned its grant of the lot line adjustment--again, a process whereby the City's real property records were conformed to match those of the county--not only upon the requirement that a 55-foot-wide easement across two lots be granted to the City, but also upon *Amici's* and their neighbors' entering into "nonremonstrance agreements" with the City. The nonremonstrance agreement (the full text of which is reprinted herein as Appendix B) violated *Amici's* First Amendment freedoms by conditioning the lot line adjustment on the applicants entering in to the following "agreement":

> In consideration of not being required to improve [bordering] streets at this time, [*Amici*] hereby waive any and all right to remonstrate against the improvements of said streets in accordance with the City of Lake Oswego's applicable street improvement standards in effect at the time of such improvement. [*Amici*] irrevocably consent to the formation of a Local Improvement District by the City of Lake Oswego or the inclusion of said property into a zone of benefit, for the purpose of assessing the cost of such improvement to the said property and to any other property benefited by the improvement, such assessment to be made in accordance with the applicable laws and ordinances as the same may exist at the time of the improvement. . . .
>
> Also, in the event that the property described below is approved or becomes approved for subdivision, the undersigned waives any and all right to remonstrate against a method of assessment which distributes the assessment equally among the subdivided parcels.

The full text of the nonremonstrance agreement is reprinted in Appendix B.

Nonremonstrance agreements are common in Oregon; the City of Lake Oswego has recorded hundreds of them in the property records of the Clackamas County courthouse, and a survey of the practices of Oregon counties and municipalities disclosed that at least 30 of the larger municipalities in Oregon routinely require nonremonstrance agreements. Indeed, the undersigned represents private homeowners, William and Debra Larsson, who are now challenging the City of Lake Oswego's requirement that the Larssons provide the City with a nonremonstrance agreement similar to Appendix B as a condition of the City's issuance of a minor partition.[4]

The purpose of nonremonstrance agreements is purely political: to facilitate the formation of local improvement districts by removing from the landowner and his successor(s) in title the constitutional right to object to the government's attempt to form such districts. Both the Oregon and U.S. Constitutions guarantee individuals the right to free speech and the right to petition their

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[4] *Larsson v. City of Lake Oswego*, Oregon Land Use Board of Appeals Docket No. 93-174 (oral argument scheduled for January 13, 1994).

governments for redress of grievances. Both the Oregon and U.S. Constitutions also guarantee individuals the right to vote. Nonremonstrance agreements rob the landowner and his successors of those rights. Because the grant of the permit was conditioned on the surrender of fundamental civil and political rights, *Amici* submit that under the doctrine of unconstitutional conditions those agreements are void.

CONCLUSION

It is clear that the Court's decision in this case will affect *Amici*'s claim that just compensation must be paid for the City of Lake Oswego's taking of a 55-foot-wide drainage easement in return for a lot line adjustment. By expanding the analysis of the *Dolan* case to encompass the doctrine of unconstitutional conditions, this Court can assist in eliminating the abuse inherent in nonremonstrance agreements of conditioning a wide variety of land use permits upon the recipients' surrender of civil and political rights. Because of the importance of those fundamental freedoms and because of the widespread use of nonremonstrance agreements by Oregon municipalities, *Amici* respectfully invite the Court to consider the doctrine of unconstitutional conditions in the *Dolan* context.

Respectfully submitted,

Thomas H. Nelson
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Portland, OR 97204-1268
Telephone: (503) 224-3380
Counsel for Amici Curiae

January 12, 1994

APPENDIX

APPENDIX A

Reprint of Portions of

Staff Report
CITY OF LAKE OSWEGO
Land Development Services Division

APPLICANT:	FILE NO.:
Thomas Howard Nelson/Daniel Reis	SD 1-89
PROPERTY OWNER:	**STAFF:**
Thomas Howard Nelson/Daniel Reis	Michael R. Wheeler
LEGAL DESCRIPTION:	**DATE:**
Tax Lot 100, 102 of Tax Map 2 1E 15AA	March 21, 1989
LOCATION:	**NEIGHBORHOOD ASSOCIATION:**
Northeast corner of intersection of Chapin Road and Cherry Lane	Hallinan
COMP. PLAN DESIGNATION:	**ZONING DESIGNATION:**
R-15	R-15

I. APPLICANT'S REQUEST

The applicants are seeking approval for a lot line adjustment to reconfigure two parcels, both in excess of 15,000 square feet.

. . . .

III. ACTION TAKEN

The staff approves the proposed minor partition, subject to the following conditions:

1. A final plan (as depicted in Exhibit 3, and modified as described in conditions number 5, 6, 7 and 8) shall be submitted to City staff for review and signature of approval within one year of the date of this decision. Upon written application, prior to expiration of the one year period, the City Manager shall, in writing, grant a one year extension. Additional extensions may be requested in writing and must be submitted to the City Manager for review of the project for conformance with the current law, development standards and compatibility with development which may have occurred in the surrounding area. The extension may be granted or denied and, if granted, may be conditioned to require modification to bring the project into compliance with then current law and compatibility with surrounding development.
2. The final plan shall be registered with the Clackamas County Surveyor's Office and recorded with the Clackamas County Clerk's Office.

3. Legal descriptions (metes and bounds) to be specified on legal instruments for title transfer for recording with the Clackamas County Clerk's Office shall be provided to City staff for review. Actual recording shall not be a condition of approval of this decision. However, when recorded, the instruments for both parcels shall reference this land use application -- City of Lake Oswego Land Development Services Division, File No. SD 1-89.
4. ***The applicants shall sign nonremonstrance agreements and petitions for future improvements to both Cherry Lane and Chapin Road.***
5. The final plan shall be modified to show prior rights-of-way dedicated along Chapin Road and Cherry Lane.
6. ***Modifications to the plan demonstrating conformance with the Stream Corridor Development Standard shall be submitted for the review and approval of staff. The area which coincides with the stream corridor buffer zone shall be dedicated by the applicant to the public in an easement for storm drainage purposes.***
7. The applicants shall demonstrate whether or not the existing dwelling on Parcel 1 is connected to sanitary sewer. In the event that the applicants cannot demonstrate

such connection, the final plan shall be modified to show the limits of an easement for the existing septic tank and drainfield, necessary to provide for access and maintenance. This easement shall be temporary in nature and shall terminate upon connection to the existing sanitary sewer.

8. The final plan shall be modified to show the limits of a private utility easement for sanitary sewer over Parcel II to serve Parcel I.

9. The existing dwelling shall be connected to sanitary sewer through the easement described in number 8 above.

10. Evidence of the above to be provided to the Public Works and Development Services Department prior to the issuance of building permits requested subsequent to the date of this approval.

11. Surface water may be directed to the stream corridor. An erosion and siltation control plan shall be submitted upon

application for a building permit for Parcel II. Conformance to an approved plan shall be a condition of building permit approval.

Prepared by:

/s/ Michael R. Wheeler — 22 March 1989
MICHAEL R. WHEELER — Date
Associate Planner

Approved by:

/s/ Karen M. Scott — 3/22/89
KAREN M. SCOTT — Date
Assistant City Manager
Planning and Development

Exhibits

1. Tax Map
2. Applicant's Narrative
3. Site Plan
4. Legal Descriptions
5. As-built Drawings: Sanitary Sewer (portion)

(Emphasis added.)

APPENDIX B

Reprint of

RESTRICTIVE COVENANT
WAIVING RIGHT OF REMONSTRANCE
FOR STREET IMPROVEMENTS

The undersigned, being the legal owners of the real property described below, do hereby consent to the improvement of the public streets bordering said property. In consideration of not being required to improve the said streets at this time, we hereby expressly waive any and all right to remonstrate against the improvement of said streets in accordance with the City of Lake Oswego's applicable street improvement standards in effect at the time of such improvement. We irrevocably consent to the formation of a Local Improvement District by the City of Lake Oswego or the inclusion of said property into a zone of benefit, for the purpose of assessing the cost of such improvement to the said property and to any other property benefited by the improvement, such assessment to be made in accordance with applicable laws and ordinances as the same may exist at the time of the improvement. It is understood that "improvement of streets", as the term is used herein, includes construction of curbs and gutters, sidewalks, storm drains, illumination, traffic control

devices, and all other work and improvements deemed necessary by the City of Lake Oswego to bring the streets into conformance with applicable improvement standards.

Also, in the event that the property described below is approved or becomes approved for subdivision, the undersigned waives any and all right to remonstrate against a method of assessment which distributes the assessment equally among the subdivided parcels.

The signatures appearing on this document are to be construed as equivalent to signatures appearing on a petition to form a Local Improvement District for the aforesaid purposes.

The covenants herein contained shall be binding upon the undersigned and upon all subsequent owners of said property as covenants running with the land and effective for twenty years from the date hereof; provided, however, that the City of Lake Oswego shall have the right to extend the covenants for an additional twenty years by recording a notice of such extension in the deed records of the County in which said property is situated prior to the expiration of the first twenty-year period.

The property subjected to these covenants is a tract of land situated in the Northwest 1/4 of Section 14 and the Northeast 1/4 of Section 15, Township 2 South, Range 1 East of the Willamette

Meridian, as more fully described in Attachment No. 1, attached hereto and by this reference incorporated herein.

/s/ Thomas H. Nelson
Thomas H. Nelson

/s/ Esther H. Nelson
Esther H. Nelson